SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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ARK3 DOE,

Plaintiff,

v.

DIOCESE OF ROCKVILLE CENTRE A/K/A/ THE ROMAN CATHOLIC DIOCESE OF ROCKVILLE CENTRE, NEW YORK ET AL.,

Defendants.

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Index No. 900010/2019

MEMORANDUM OF LAW IN SUPPORT OF THE DIOCESE OF ROCKVILLE CENTRE'S MOTION TO DISMISS

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The Diocese of Rockville Centre ("the Diocese") respectfully moves the Court, pursuant to CPLR 3211(a)(5) and (a)(7), to dismiss the complaints in the actions identified in Exhibit A to the accompanying Affirmation of Todd R. Geremia.

INTRODUCTION

Section 3 of the Child Victims Act ("CVA") is codified in CPLR 214-g. It provides for the revival, for a one-year period, of all formerly time-barred civil actions that are based on enumerated sexual offenses. The New York State Constitution imposes a constraint, as a matter of due process, on any such legislative enactment. Specifically, the Court of Appeals has for nearly 100 years interpreted the Due Process Clause in our State Constitution to allow for revival of time-barred claims only in exceptional circumstances where claimants were previously prevented in some specific manner from asserting timely claims. As addressed in more detail in the argument section below, these have been circumstances where a claimant could not have brought a timely claim because, for example, he was detained abroad in an occupied territory during wartime or where a latent injury caused by exposure to a drug did not manifest until after expiry of the formerly applicable limitations period. In these rare cases, the Court of Appeals has held that the Due Process Clause allows for the exercise of what it has characterized as an exceptional legislative power "to remedy an injustice" created by circumstances that prevented the assertion of a timely claim.

The claims that CPLR 214-g revives do not fit within the scope of this narrowly circumscribed legislative authority. In *Zumpano v. Quinn*, 6 N.Y.3d 666 (2006), the Court of Appeals addressed whether more than forty plaintiffs who had asserted time-barred claims based on allegations of clergy sexual abuse—and who had attempted to invoke various common law doctrines to do so—were capable of timely asserting their claims before the limitations period expired. The Court expressly held that they were and, specifically, that "each plaintiff was aware

of the sexual abuse he or she suffered" and "had sufficient knowledge to bring an intentional tort cause of action" during the limitations period. *Id.* at 674; *see also id.* at 676 ("Plaintiffs possessed timely knowledge of the actual misconduct and the relationship between the priests and their respective dioceses to make inquiry and ascertain relevant facts prior to the running of the statute of limitations.").

The claims revived pursuant to CPLR 214-g are thus like the claims of workers who quite recently sought to recover damages for injuries that they incurred when cleaning up toxic dust from the collapse of the World Trade Center on September 11, 2001. There, too, the New York State legislature sought to revive the time-barred claims of this sympathetic class of individuals—a three-year limitations period and a shorter period imposed by a notice-of-claim requirement applied. But a federal court, applying the Court of Appeals' binding due process precedent, ruled that the enactment "does not fall within the narrow exception for revival statutes," because the relief workers were not subjected to a "'practical and total inability to commence (an) action'" in a timely manner. *See In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 66 F. Supp. 3d 466, 476 (S.D.N.Y. 2014) (quoting the Court of Appeals' decision in *Gallewski v. Hentz & Co.*, 301 N.Y 164, 175 (1950)), *vacated on other grounds*, 892 F.3d 108 (2d Cir. 2018). The legislature thus did not have the authority under the New York State Constitution Due Process Clause to revive these claims, notwithstanding that many of the workers at issue were unaware of the applicable limitations period or even that they had been provided insufficient information about their work conditions. *See id.* at 475. As with the claimants asserting time-barred claims for clergy sexual abuse in *Zumpano*, "those who wished to sue were not barred from doing so," *id.* at 476, and the legislature therefore lacked the constitutional authority to revive their claims.

The New York State Constitution and the Court of Appeals' interpretation of the due process constraints imposed by the Constitution are binding here. Under nearly 100 years of Court of Appeals' precedent, as recently re-affirmed by the Court of Appeals in the *World Trade Center* case, CPLR 214-g does not fit within the narrow exception allowing for revival of time-barred claims in exceptional circumstances. On this fundamental and threshold ground, the CVA actions brought against the Diocese should be dismissed because they assert time-barred claims that are not properly subject to revival in accordance with the State Constitution's Due Process Clause. While courts in other states have allowed for legislative enactments to revive claims for sexual abuse, those states have all applied a standard derived from the U.S. Constitution that "generally pose[s] no issue" for claim-revival statutes. *See Matter of World Trade Ctr. Lower Manhattan Disaster Litig.*, 30 N.Y.3d 377, 394 (2017) ("Claim-revival statutes generally pose no issue under the Fourteenth Amendment to the United States Constitution (*see Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 229 (1995) [statutes of limitations 'can be extended, without violating the Due Process Clause, after the cause of the action arose and even after the statute itself has expired'])."). In this State, though, the legislature and the courts are subject to the far more demanding constraints imposed by the New York State Constitution. And, indeed, courts in states that, like New York, impose a meaningful constitutional constraint have held that their legislatures also lack the authority to revive time-barred claims for sexual abuse and have dismissed lawsuits invoking claims-revival statutes to assert such claims.

The standards and rules imposed by the New York State Constitution and Court of Appeals govern here and are a necessary check on the legislative and administrative branches, notwithstanding the nature of the issues and the injuries addressed by the CVA. The Diocese appreciates the seriousness of these issues—and it has committed to wide-ranging, ongoing, and

concrete actions to reconcile with, heal, and compensate victims of these heinous offenses.[511] The claims-revival provision of the CVA does not, however, meet the strict standard imposed by the State Constitution and the Court of Appeals. This standard governs here and must be applied, and these lawsuits should therefore be dismissed.

The analysis of this motion should, the Diocese respectfully submits, end there. If the Court were to disagree, however, the Diocese respectfully submits that the claims asserted against it in these complaints must be subjected to ordinary legal rules and analysis. The rules of not only constitutional law but also civil procedure, tort, and statutory construction should be applied to these lawsuits without exception, fairly, and properly. Many of the claims asserted against the Diocese here are, as shown below, improper as a matter of fundamental and long-standing principles of New York law and should be dismissed. If these lawsuits are going to proceed in any manner—which, as a matter of due process, they should not—the Diocese respectfully submits that now is the time, at the outset, for the Court to impose a proper legal order on them and clarify the standards that govern the assertion and pleading of causes of action pursuant to the CVA. The table attached to the Affirmation accompanying this motion identifies which grounds for dismissal explained in this memorandum of law apply to which causes of action in the complaints that are subject to this motion.

[511] Since 2017, more than 275 victims of sexual abuse have accepted compensation from the Diocese totaling over $50 million, through an Independent Reconciliation and Compensation Program ("IRCP") that is administered by Kenneth Feinberg who also administered the September 11th Victims Compensation Fund. *See* Ltr. From Bishop John O. Barres, Diocese of Rockville Centre (Aug. 11, 2019), https://www.drvc.org/wp-content/uploads/CVA_release_08_14_19.pdf. To date, the IRCP is still accepting and processing claims. *See id.* The Diocese also provides pastoral care and mental health support to any victim who requires assistance and, in 2003, established an Office for the Protection of Children and Young People, which has implemented protocols to protect children, reaches out to and supports victims of sexual abuse, and works closely with appropriate law enforcement personnel to report abuse allegations. *Id.*

ARGUMENT

I. THE REVIVAL PROVISION IN CPLR 214-G VIOLATES THE DUE PROCESS CLAUSE OF THE NEW YORK STATE CONSTITUTION

A. Statutes of Limitations Protect Both the Integrity of the Judicial Process and Defendants' Due Process Rights as a Century of New York Precedent Makes Clear

A basic tenet of every legal system, including New York's, is that statutes of limitations protect a fundamental right of repose that benefits both potential defendants and society at large by ensuring that individual rights are protected and the courts can function properly. *See Jensen v. Gen. Elec. Co.*, 82 N.Y.2d 77, 87 (1993) (dismissing claims as time-barred and observing that the protection of plaintiffs' ability to timely sue and of defendants' rights not to be "potentially liable in perpetuity. . . serves a substantial public policy that traditionally *benefits all society* by creating some measure of repose") (emphasis added); *Goldsmith v. Howmedica, Inc*., 67 N.Y.2d 120, 124 (1986) (dismissing claims as time-barred, and noting that statutes of limitations protect "*the repose of defendants and society*" against the threat of "open-ended claims") (emphasis added). The U.S. Supreme Court has observed, for instance, that "although affording plaintiffs what the legislature deems a reasonable time to present their claims, [statutes of limitations] *protect defendants and the courts* from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (emphasis added).

Forcing an overburdened legal system to adjudicate very old claims, and especially time-barred claims that are revived when the key evidence is no longer available, impairs the due process rights of defendants. As the New York Court of Appeals has explained, "defendants are entitled to a fair opportunity to defend claims against them before their ability to do so has

deteriorated." *Snyder v. Town Insulation, Inc*., 81 N.Y.2d 429, 435-36 (1993) (courts are "reluctant to modify the law governing limitations, even when a party's case seems particularly compelling" in order to protect the rights of defendants); *see also Kubrick*, 444 U.S. at 117 ("Statutes of limitations, which are found and approved in all systems of enlightened jurisprudence . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.") (internal quotation marks and citation omitted).[512]

Both the U.S. Constitution and the New York State Constitution contain provisions to ensure that all persons are afforded due process of law, including with regard to defending untimely claims. The New York Court of Appeals has explained that the New York Constitution provides more "stringent" protections than federal law against legislative efforts to revive time-barred claims. *See, e.g., Hymowitz v. Eli Lilly & Co*., 73 N.Y.2d 487, 514 (1989); *see also* N.Y. Const., art. I, § 6 ("No person shall be deprived of life, liberty or property without due process of law."). Under the federal due process standard, "[c]laim-revival statutes generally pose no issue." *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 394 (2017). A legislative body may, under this standard, revive a formerly time-barred claim—or otherwise modify an applicable limitations period—so long as the defendant did not acquire a

[512] *See also Campbell v. Holt*, 115 U.S. 620, 630 (1885) (Bradley, J., dissenting) ("[A]n immunity from prosecution in a suit, whether by reason of a statutory bar or otherwise, is as valuable a right to one party as the right to prosecute that suit is to the other"). As Judge Weinstein observed in the *Agent Orange* litigation, the "traditional purposes underlying statutory limitations" include protecting defendants against "[s]taleness of claims," resulting in defendants' "los[s of] evidence on their key defenses through the passage of time." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 812 (E.D.N.Y. 1984).

vested right to a property interest as a result of the passage of time. *See Chase Secs. Corp. v. Donaldson*, 325 U.S. 304, 311-12 (1945) (citing *Campbell v. Holt,* 115 U.S. 620 (1885)).

By contrast, "the development of [New York] law on claim-revival statutes has differed from the development of the federal rule." *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig*., 30 N.Y.3d at 394. New York law regards "revival statutes" as an "extreme exercise of legislative power." *Hopkins v. Lincoln Trust Co.*, 233 N.Y. 213, 215 (1922) (Cardozo, J.). Unlike the federal rule, "our state standard has not turned on this formal distinction between claim-revival statutes that intrude upon a 'vested' property interest and those that do not." *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig*., 30 N.Y.3d at 394. Instead, the New York standard for claim revival employs "a more functionalist approach," and "weighs the defendant's interests in the availability of a statute of limitations defense with the need to correct an injustice." *Id.* This tilts toward protecting the defendant where, as here, the staleness of the claims poses problems for the integrity of the judicial system and will impair defendants' rights to defend themselves. *See* Part I(B) & (C).

The Court of Appeals recently reaffirmed that "a claim-revival statute will satisfy the Due Process Clause of the State Constitution if it was enacted as a reasonable response in order to remedy an injustice." *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d at 400. Prior cases in which courts have determined that a claim-revival provision comported with the New York State Constitution's Due Process Clause reflect that the injustice subject to this extraordinary remedy is limited to when a "plaintiff could not have brought an action in a timely manner." *Doe v. Hartford Roman Catholic Diocese Corp.*, 317 Conn. 357, 433 n.58 (Conn. 2015); *see also Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487 (1989); *Matter of McCann v. Walsh Constr. Co.*, 282 App. Div. 444 (3d Dep't 1953), *aff'd without op.*, 306 N.Y.

904 (1954); *Gallewski v. Hentz & Co.*, 301 N.Y 164 (1950); *Robinson v. Robins Dry Dock & Repair Co.*, 238 N.Y. 271 (1924). The precedent synthesized by the Court of Appeals in the *World Trade Center* case makes this clear.

First, in *Robinson* the wife of a deceased worker began collecting worker's compensation following her husband's work-related death as this was her exclusive legal remedy at the time. *Robinson v. Robins Dry Dock & Repair Co*., 238 N.Y. 271, 274-75 (1924). More than two years later, the U.S. Supreme Court declared New York's workers' compensation law to be unconstitutional, which ended the wife's worker's compensation benefit. *See Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). By that time, the wife's wrongful death action was time-barred under New York law. *See Robinson*, 238 N.Y. at 275. A claim by the wife for her husband's wrongful death was also not cognizable at any time during the applicable limitations period, because for that entire time worker's compensation was the exclusive remedy for the husband's work-related death. The legislature enacted a provision to address this catch-22, creating a one-year period for plaintiffs to commence a negligence action, even if it were otherwise time-barred, to seek compensation that was formerly available exclusively under the then-defunct worker's compensation law. *Id.* at 276-81. In other words, because the spouses of deceased workers could not have brought a timely claim for wrongful death based on a work-related injury prior to the U.S. Supreme Court's ruling in *Knickerbocker Ice*, the legislature revived such claims for a one-year period. *See id.* at 280-81.

The Court of Appeals' decision in *Gallewski* similarly addressed reviving formerly time-barred causes of action that claimants were effectively prevented from asserting in a timely manner. In *Gallewski*, the Court of Appeals held that a statute enacted to retroactively toll the statute of limitations for individuals residing in Axis-occupied countries during World War II

comported with due process. *Gallewski v. Hentz & Co.,* 301 N.Y 164, 171-75 (1950). The Court noted that "the citizens and residents of occupied territory were, during such occupation, under a *practical and total inability to commence action* in the courts of this State to protect and effectuate their rights." *Id.* at 175 (emphasis added). Because these plaintiffs, too, were unable to assert timely claims under the applicable limitations period, the Court of Appeals in *Gallewski* concluded that the legislature's retroactive tolling of the otherwise applicable limitations period comported with due process. *Id.* ("To permit the Statute of Limitations to run against [plaintiffs'] claims during the *continuance of such inability* [to sue] would not accord with elementary notions of justice and fairness.") (emphasis added).

Likewise, in both *Matter of McCann* and *Hymowitz* claims-revival provisions were held to comport with due process when they addressed claims that could not have been timely asserted. Both cases presented claims by plaintiffs who were afflicted by latent diseases where symptoms did not typically appear until *after* the applicable limitations period expired. *Matter of McCann v. Walsh Constr. Co.*, 282 App. Div. 444, 446 (3d Dep't 1953), *aff'd without op.*, 306 N.Y. 904 (1954) (cassion disease is "of a slow-starting or insidious nature" and "very often . . . more than twelve months elapse[s] after the contraction of the disease before its presence [is] known or apparent"); *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 502-3 (1989) (the exposure to the drug diethylstilbestrol (DES) by pregnant mothers causes a latent injury *in utero* and "many claims [are] barred by the Statute of Limitations before the injury [is] discovered"). In both instances, the legislature changed the rule for when claims accrued, so that the limitations period did not start until the claimant was aware of the disease. At the same time, the legislature also revived, for a one-year period, all formerly time-barred causes of action predicated on such late-manifesting diseases. The Court of Appeals emphasized, again, that the formerly applicable

rule—the "exposure rule" for determining when a cause of action accrued—"*prevented* the bringing of timely claims for recovery." *Hymowitz,* 73 N.Y.2d at 514 (emphasis added); *see also Sweener v. Saint-Gobain Performance Plastics Corp.*, No. 1:17-CV-0532, 2019 WL 748742, at *8 (N.D.N.Y. Feb. 7, 2018) (citing *Hymowitz* and *McCann* as addressing claims-revival provisions for "latent personal injuries" in holding that CPLR 214-f comported with due process because the claims-revival provision there allowed those "who suffer[ed] latent injuries stemming from environmental contamination[] to pursue claims that would otherwise be time-barred simply because a defendant's tortious conduct was unknown").

These "exceptional circumstances"—once again, the practical impossibility for plaintiffs to bring a timely claim under the formerly applicable limitations period—allowed the legislature to revive formerly time-barred claims consistent with the demands of due process under the New York State Constitution. *See id.*; *see also Matter of McCann,* 282 App. Div. at 450 ("As the Legislature recognized, in the case of a disease of an insidious character, the effects of which might be latent or long delayed, the right to compensation might be barred by the operation of the Statute of Limitations even before the claimant was aware of the fact that he had the disease").

B. Plaintiffs Could Have Asserted Their Claims in a Timely Manner, as the Court of Appeals Ruled in *Zumpano*

The legislature's attempt here through CPLR 214-g to revive, for a one-year period, formerly time-barred claims predicated on certain types of alleged sexual abuse does not comport with the New York State Constitution's Due Process Clause. Unlike all of the previous situations where the Court of Appeals has ruled that the "extreme" measure of reviving claims survived due process scrutiny, the claimants here were not prevented from asserting timely claims. Indeed, the Court of Appeals itself has addressed this very issue.

The Due Process Clause allows the legislature to revive formerly time-barred claims only where they could *not* have been raised earlier. That is not so here. The formerly time-barred claims revived by the legislature pursuant to the CVA all could have been brought within the then-applicable three or five year period, after plaintiffs attained the age of majority. These claims were neither barred by law, as in *Robinson*, nor were the plaintiffs unable to return to the U.S. during a world war as in *Gallewski*, nor is it the case, as in *McCann* and *Hymowitz*, that plaintiffs' injuries did not manifest during the applicable limitations period.

The New York Court of Appeals has already decided that claimants asserting allegations of sexual abuse—indeed, in that consolidated case, clergy sexual abuse—were *not* prevented from asserting their claims in a timely manner under the formerly applicable limitations period. *See Zumpano v. Quinn*, 6 N.Y.3d 666 (2006). In *Zumpano*, the Court addressed two actions, one brought by an individual plaintiff and the other by 42 plaintiffs. *Id*. at 671-72. Both complaints alleged clergy sexual abuse for which the statute of limitations had long expired, but the plaintiffs sought equitable tolling of their limitations periods and asserted equitable estoppel against defendants. Defendants moved to dismiss. While the Court of Appeals observed that the alleged conduct was "reprehensible," it rejected plaintiffs' arguments. *Id*. at 678. The Court expressly held that all plaintiffs in both the individual and the 42-person action "failed to satisfy th[eir] burden" of "establish[ing] that subsequent and specific actions by defendants somehow kept them from timely bringing suit." *Id*. at 674. Specifically, the Court ruled at the motion to dismiss stage that the plaintiffs had the practical ability to timely sue their individual abusers and the entities that employed them because each plaintiff was properly deemed to have been timely aware of the allegedly abusive conduct:

> [E]ach plaintiff was aware of the sexual abuse he or she suffered at the hands of defendant priests. Certainly they had sufficient

> knowledge to bring an intentional tort cause of action against the individual priests. Plaintiffs were likewise aware that the priests were employees of the dioceses and could have brought actions against the dioceses, or at least investigated whether a basis for such actions existed.

Id.; *see also id.* at 676 (noting that "plaintiffs were fully aware that they had been abused"). The Court, accordingly, affirmed the dismissal of both actions as time-barred.[513]

The Court of Appeals' decision in *Zumpano* underscores why the CVA's one-year revival provision does not comport with Due Process as a matter of New York state law. Individuals should not be afforded a "new opportunity for their day in court"—as declared by the Governor in signing the CVA into law[514]— when they were "fully aware that they had been abused," *Zumpano*, 6 N.Y.3d at 676, and did not previously assert a claim before the applicable limitations period expired. All of the CVA actions brought against the Diocese pursuant to the revival provision in CPLR 214-g were, by definition, formerly time-barred. Indeed, in some cases the limitations periods on the asserted causes of action expired decades ago. The claimants asserting these causes of action were, as in *Zumpano*, "aware of the sexual abuse he or she

[513] At the end of the opinion, the Court stated that "[a]ny exception to be made to allow these types of claims to proceed outside of the applicable statutes of limitations would be for the Legislature, as other states have done." *Id*. at 677. The Court was not in that dicta, however, addressing the due process constraint on any legislative attempt to revive formerly time-barred claims. Indeed, there was not yet any such legislation for the Court to review. The Court added a footnote, citing as examples two states which allowed for claims revival: "*See e.g*., Conn Gen Stat § 52-577d (extending the time period for minors to bring sexual abuse claims to 30 years from the age of majority); Cal Code Civ Proc § 340.1 (c) (creating a one-year window in 2003 for childhood sexual abuse actions where the applicable statute of limitations had expired)." *Id*. at 677 n.4. However, both Connecticut and California address a legislature's authority to enact claims-revival provisions under the U.S. Constitution's due process standard, which is much less protective than the New York State Constitution's standard. *See* Part I(E).

[514] Governor Cuomo Announces Opening of One-Year Window Under the Landmark Child Victims Act, Aug. 14, 2019, *available at* https://www.governor.ny.gov/news/governor-cuomo-announces-opening-one-year-window-under-landmark-child-victims-act.

suffered" and "had sufficient knowledge" to assert a timely claim, against the alleged abusers and the dioceses. *Id*. at 674.

Accordingly, unlike all of the cases where the Court of Appeals has previously ruled that the Due Process Clause allows for the revival of formerly time-barred claims, the legislature here did not enact a claims-revival provision to allow a plaintiff to assert a claim that he or she was previously prevented from asserting in a timely manner. As the Court of Appeals has repeatedly stated, only in such "exceptional circumstances" is claims-revival permitted. *See Hymowitz*, 73 N.Y.2d at 514; *Gallewski*, 301 N.Y. at 174. If it were enough for the legislative and executive branches to declare that a claims-revival provision will give previously time-barred claimants a new "day in court"—in the absence of any showing that the impacted claimants had previously been unable to assert timely claims—the standard developed and refined by the Court of Appeals would amount to no real standard at all. The legislature could satisfy *that* standard for virtually *any* claims-revival enactment by declaring that the claimants at issue should be afforded another opportunity to bring their time-barred claims, even where they were not previously prevented from asserting such claims in a timely manner. That directly contradicts the Court of Appeals' century-long approach to this issue in its methodical jurisprudence. *See Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d at 400.

The federal district court decision in *World Trade Center* is instructive on this point. While that decision was ultimately vacated solely on the basis of a threshold standing issue (not presented here),[515] the court there invalidated a claims-revival provision under the New York

[515] The Second Circuit ruled, on the basis of the Court of Appeals' answer to another certified question in that case, that the state-created-entity defendant—the Battery Park City Authority—did not have the legal capacity to challenge the constitutionality of the claims-revival provision. The Second Circuit did not rule on the merits of the district court's analysis of the constitutionality of the claims-revival enactment at issue. *See In re World Trade Ctr.*, 892 F.3d

State Constitution's Due Process Clause on the same basis asserted by the Diocese here. The statute at issue in that case revived otherwise time-barred claims by disaster-relief workers who were allegedly injured during the cleanup and rescue efforts following the September 11, 2011 terrorist attack on the World Trade Center. After canvassing the Court of Appeals' case law on the issue, the district court held that this claims-revival provision did not fit within the "narrow exception for revival statutes, and is unconstitutional under the Due Process Clause of the New York State Constitution." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 66 F. Supp. 3d 466, 476 (S.D.N.Y. 2014), *vacated on other grounds*, 892 F.3d 108 (2d Cir. 2018). The district court reasoned that, unlike in the Court of Appeals' precedent addressing this issue, the plaintiffs in *World Trade Center* were protected by a rule that the limitations period on their claims did not begin to run until they had discovered their injuries. *See id.* at 475-76. They thus were not confronted with a "practical and total inability" to commence a timely lawsuit, as in *Gallewski* and the other cases where claim revival has been allowed. *See id.* at 474-75. And, indeed, the district court noted that many plaintiffs had filed timely lawsuits. *Id.* at 476.

The claims-revival provision in the CVA is, in material respects, like the one at issue in *World Trade Center*. In both instances, the legislature purported to revive claims by plaintiffs who were not prevented from asserting them in a timely fashion. In *World Trade Center*, the district court noted that the legislature had given as its justification, among other things, that certain claimants were given incorrect information about their work conditions and were unaware of the applicable limitations periods. *See* 66 F. Supp. 3d at 475. But the district court

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at 110-11 (noting the Court of Appeals' holding that "a public benefit corporation is treated like any other state entity and is subject to the 'general rule' that 'state entities lack capacity to challenge the constitutionality of a state statute,' with only a few 'narrow' exceptions") (quoting *Matter of World Trade Ctr.*, 30 N.Y.3d at 383, 387).

determined those were impermissible grounds for enacting a claims-revival provision because "[t]hese rationales do not amount to the 'exceptional circumstances' justifying the 'extreme exercise of legislative power' that a revival statute entails." *Id.* As the court noted, "absent in this case is a 'practical and total inability to commence [an] action,'" as in the Court of Appeals precedent on this due process issue. *Id.* at 476. "Here, those who wished to sue were not barred from doing so." *Id.* Likewise, as the Court of Appeals has already ruled in *Zumpano*, plaintiffs with time-barred claims predicated on allegations of clergy sexual abuse cannot establish that they were "kept … from timely bringing suit." 6 N.Y.3d at 675. "[E]ach plaintiff was aware of the sexual abuse he or she suffered at the hands of defendant priests." *Id.*

C. The Integrity Of The Judicial Process And Defendants' Due Process Rights Are Undermined By The Revival Of Stale Claims

The legislature, accordingly, did not have the authority to revive formerly time-barred claims for sexual abuse under the applicable due process standard, because claimants were not effectively prevented from asserting timely claims.

Importantly, revival provisions also implicate defendants' due process rights to assert an adequate defense and, relatedly, the integrity of the State's judicial system. That is because of how old many of these claims are. Pursuant to the one-year-revival window, CPLR 214-g, the Diocese would have to rebut allegations of an individual, such as Michael Perrotta who is at least 70 years old but claims he was abused as a child.[516] The alleged events at issue in his lawsuit occurred more than six decades ago. "[W]eighing the defendant's interest in the availability of statute of limitations defense with the need to correct an injustice," *Matter of World Trade Ctr.*,

[516] *See Michael Perrotta v. The Diocese of Rockville Centre et al.,* Index No. 615737/2019 (Sup. Ct. Suffolk Cty. 2019) NYSECF Doc. No. 5.

30 N.Y.3d at 394, further underscores the due process limitation that constrained the legislature's authority here.

Indeed, this is the opposite of the situation in *Gallewski* and *McCann*: as Judge Weinstein noted, in those cases, staleness concerns, such as "los[s] of evidence on their key defenses through the passage of time," did not exist and, "[o]n the contrary, time ha[d] worked in favor of both plaintiffs and defendants." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 812 (E.D.N.Y. 1984). Here, the passage of time is affirmatively detrimental: key witnesses in connection with decades-old events, for example, will be unavailable or in some cases deceased. This puts the Diocese in the untenable position of having to rebut allegations where pertinent evidence no longer exists and where individuals with first-hand knowledge of the alleged events are not available or cannot be found due to the passage of time. The Diocese will be unable, due to missing or dead witnesses and many other factors impacted by the extensive passage of time, to fairly and properly defend itself and rebut evidence presented by plaintiffs. This problem, which pervades these lawsuits, undermines both the Diocese's due process rights and the integrity of the judicial system.

Finally, there are strong, actual, not merely hypothetical, reliance interests at issue here—by both plaintiffs and these specific defendants—on the statutes of limitations that have existed for many years. These reliance interests are among the purposes of having statutes of limitations. *See* Part I(A). Through the Independent Reconciliation and Compensation Program ("IRCP"), the Diocese has, since 2017, provided compensation totaling more than $50 million and entered into corresponding releases with more than 275 claimants.[517] The releases entered

[517] *See* Ltr. From Bishop John O. Barres, Diocese of Rockville Centre (Aug. 11, 2019), https://www.drvc.org/wp-content/uploads/CVA_release_08_14_19.pdf.

into by these claimants through the IRCP are, by their terms, a "broad general release of any and all claims Releasor has, or may in the future have" against the Diocese, its current and former bishops, agents, affiliates, etc.[518] The claimants also acknowledged that they "fully understand[]" the agreement as a "full and final compromise, adjustment and resolution of any and all claims he/she may now have, or ever will have against Releasees."[519]

For the court system to now be flooded with CVA actions against the Diocese asserting otherwise-time-barred claims, after other would-be plaintiffs resolved their claims with the Diocese in reliance on the existing statute of limitations, undermines the integrity of the judicial system. The New York Court of Appeals has, over the last century, consistently reiterated the importance and the sweep of the Due Process protections to ensure "fundamental fairness": "A denial of due process has been defined as the failure to observe that fundamental fairness essential to the very concept of justice." *People v. Leyra*, 302 N.Y. 353, 364 (1951) (internal quotation mark omitted)*; see also Bertholf v. O'Reilly*, 74 N.Y. 509, 519 (1878) ("[T]he words 'due process of law' . . . are the fundamental civil rights, for the security of which society is organized, and all acts of legislation which contravene them are within the prohibition of the constitutional guaranty."); *Stuart v. Palmer*, 74 N.Y. 183, 190 (1878) (The Due Process Clause "is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation."). It is a fundamental precept of New York law, under the State Constitution's Due Process Clause, that the legislature does not have the authority to change the rules after the fact and revive formerly time-barred claims except in narrowly circumscribed situations that are not presented here.

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[518] Archdiocese of New York Independent Reconciliation and Compensation Program, General Release, https://www.nyarchdioceseircpsettlementprogram.com/ords/m_453841_0001/prod/r/101 /files/static/v31/general-release-2-english.pdf.

[519] *Id.*

D. The Court Is Bound to Adhere To The Court of Appeals' Well-Established Precedent Here

These considerations warrant dismissal of the claims asserted against the Diocese here pursuant to the New York State Constitution's Due Process Clause, as interpreted and applied by the New York Court of Appeals. Of course, this Court is bound by the Court of Appeals' precedent. *See, e.g., Felice v. Warf*, No. SC 451/2019, 2019 WL 3757657, at *11 (N.Y. City Ct. Aug. 7, 2019) ("[W]e are constrained to follow what we perceive to be established precedent . . . .") (quoting *Rios v. Carrillo*, 53 A.D.3d 111, 113 (2d Dep't 2008)*; see also State v. Robert V.*, No. 251233-2010, 2011 WL 1364452 (Sup. Ct. Bronx Cty.), *on reargument*, No. 251233-2010, 2011 WL 4904400 (Sup. Ct. Bronx Cty. 2011), *aff'd*, 111 A.D.3d 541 (2013) (citing *People v. Cortes*, 80 N.Y.2d 201, 211 (1992)) (trial court bound to follow existing precedent); *People v. Scott*, 54 Misc. 3d 551, 554 (Sup. Ct. Kings Cty. 2016) ("Ignor[ing] . . . precedent . . . would be contravening the Court of Appeals' case law as well as abdicating its adjudicative duties.").

This Court must follow that binding precedent and discharge its duty to protect constitutional rights, especially where the majoritarian will, as expressed by legislation, disfavors unpopular litigants before the court. The Court of Appeals itself has emphasized that "the primary purpose of the Bill of Rights and the corresponding provisions of the State Constitution is to insure the individual, particularly the unpopular individual, a measure of protection against oppression by a majority." *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 444 (1979)*; see also, e.g., In re 381 Search Warrants Directed to Facebook, Inc.*, 29 N.Y.3d 231, 282 (2017) (Wilson, J., dissenting) ("If there is any excuse for a written constitution, if there ever has been any excuse for a written constitution, it is to write in there the protection for the minority against the aggression and the greed and the brute force of the majority.") (citing 1

REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK at 465 (1938)).

Indeed, the relevant precedent on claim revival is not only binding on this Court but unlikely to be overturned. If this issue were to reach the Court of Appeals, which has the power to overrule itself, that Court is highly unlikely to do so. That is because allowing the revival legislation to stand here would undermine almost a century of New York precedent, which would further compound the disruptive effect as both statutes of limitations and precedent ensure stability and predictability. *See, e.g.*, *In re World Trade Ctr.*, 66 F. Supp. 2d at 476 (noting that the "for nearly 100 years" the Court of Appeals has imposed due process constraints on the legislature's authority to revive formerly time-barred claims). That would be particularly troublesome because the Court of Appeals has just recently re-examined thoroughly and confirmed that precedent's soundness in *Matter of World Trade Center*.

As the Court of Appeals explained in describing the role of stare decisis in its jurisprudence, it "does not spring full-grown from a 'precedent' but from precedents which reflect principle and doctrine rationally evolved." *People v. Hobson*, 348 N.E.2d 894, 901 (1976). Accordingly, "there is potential for jurisprudential scandal in a court which decides one way one day and another way the next." *Id*. That "eminently desirable and essential doctrine" "embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations." *Id*. (citing *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (Frankfurter, J.)). "Its purpose is to promote efficiency and provide guidance and consistency in future cases by recognizing that legal questions, once settled, should not be reexamined every time they are presented." *People v. Bing*, 76 N.Y.2d 331, 338 (1990) (quoted in *People v. Crespo*, 32 N.Y.3d 176, 192 (2018) (Rivera, J., dissenting)). The strength

of precedent depends in part on the nature of the question presented. To eschew a precedent on "constitutional limitations," such as due process, as here, "the conviction of error must be imperative." *Hobson*, 348 N.E.2d at 901. And where a precedent is "the result of a reasoned and painstaking analysis" it is entitled to especial respect, more so than a "conclusory assertion of result." *Id*.; *see also Crespo*, 32 N.Y.3d at 192 (Rivera, J., dissenting) ("'the strong presumption that the law is settled by a particular ruling may be rebutted . . . only in exceptional cases" (*People v. Taylor*, 9 NY.3d 129, 149 (2007)). The Court of Appeals' recent analysis in *Matter of World Trade Center* and the harmonization of the century of its jurisprudence provides precisely such "a reasoned and painstaking analysis." *Hobson*, 348 N.E.2d at 901.

Allowing claims revival here would thus not only violate settled New York law, it would also make the New York due process standard applicable to claims-revival legislation effectively more permissive than the standard under federal law. That is directly the opposite of what the Court of Appeals has held and would effectively override nearly 100 years of precedent, leaving no real standard in its place. *See Matter of World Trade Center*, 30 N.Y.3d at 394-95. If that happened, New York would not even have the "vested right" limitation of federal law. *Id*. ("Unlike the federal rule, our state standard has not turned on this formal distinction between claim-revival statute that intrude upon a 'vested' property interest and those that do not."). If this claims-revival provision is permitted to stand, the legislature would be allowed to revive any claim of serious harm that might have been brought but was not and was sufficient to move the sympathies of the legislature. This unprincipled framework, if left unchecked by this Court, would amount to a removal of any due process constraint at all on the legislature's authority to revive claims.

Eschewing a century of firmly established precedent in this manner, reaffirmed only recently, would be particularly troubling here. Limitations periods afford certainty to litigants and the court system that, if a claim has not actually been asserted before the time for doing so expires, then it cannot be. Individuals and entities undertake other activities and make decisions in reliance on these rules, and the century-old precedent in New York reinforces this understanding. The legislature does not have the authority, as a matter of Due Process of law, to overturn these basic expectations and to unsettle the fundamental sense of repose that is created by the legal system.

E. Decisions in Other States That, Like New York, Impose Due Process Constraints on Legislative Attempts to Revive Claims Further Support the Diocese's Motion Here

While states, such as California and Delaware, that follow the federal due process standard have upheld statutes reviving time-barred child sexual abuse claims,[520] courts in other states that, like New York, impose a more strict standard, have blocked the legislature from reviving the claims.

Appellate courts in six states have specifically held that their state legislatures may not, consistently with due process constraints, allow for the revival of formerly time-barred claims of alleged childhood sexual abuse. *See Doe A. v. Diocese of Dallas*, 234 Ill.2d 393, 396 (2009) (retroactive application of Illinois statute of limitations for claims of child sexual abuse would violate due process); *Doe v. Crooks*, 364 S.C. 349, 352 (2005) (South Carolina's constitution prohibits the retroactive application of the statute of limitations for childhood sexual abuse

[520] *See Deutsch v. Masonic Homes of California, Inc.*, 164 Cal. App. 4th 748 (Cal. Ct. App. 2008); *Doe v. Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357 (2015); *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247 (Del. 2011); *Sliney v. Previte*, 473 Mass. 283 (2015); *Cosgriffe v. Cosgriffe*, 262 Mont. 175 (1993).

claims); *Kelly v. Marcantonio*, 678 A.2d 873, 877 (R.I. 1996) (Rhode Island's constitution prohibits revival of time-barred child sexual abuse claims); *Wiley v. Roof*, 641 So. 2d 66, 69 (Fla. 1994) (Florida statute reviving time-barred sexual abuse claims violates state constitution); *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 342 (Mo. 1993) (Missouri statute reviving time-barred child sexual abuse claims declared unconstitutional); *Starnes v. Cayouette*, 244 Va. 202, 207 (1992) (retroactive application of Virginia statute of limitations for child sexual abuse claims would violate due process), *overruled* by constitutional amendment, Va. Const. art. IV, § 14.[521]

The rationale of these decisions is instructive. *First*, as the New York courts have recognized in related contexts (*see* Part I(A)), claim revival implicates both judicial integrity and defendants' rights. There is an important distinction between "enlarg[ing] an already existing action limitation period" applicable to causes of action "not already time-barred," and "permitting revival of an already time-barred action that would impinge upon a defendant's vested and substantial rights and would offend a defendant's . . . due process protections." *Kelly*, 678 A.2d at 883. Quoting Justices Bradley's and Harlan's dissent in *Campbell*, 115 U.S. at 631, courts in *Wiley*, *Kelly* and *Starnes* have emphasized that "[t]he immunity from suit which arises

[521] In addition to the states that have disallowed untimely sexual abuse lawsuits, nearly half of the states have prohibited the revival of any time-barred claim under any circumstances. *See Doe v. Hartford Roman Catholic Diocesan Corp*., 317 Conn. 357, 430-31 (2015) (canvassing cases). Seven of those jurisdictions (Alabama, Colorado, Missouri, New Hampshire, Oklahoma, Tennessee, and Texas) have held that the revival of time-barred claims is precluded by independent state constitutional provisions prohibiting retroactive legislation. *Id.* at 430. One jurisdiction (Vermont) enacted a statute expressly prohibiting the revival of time-barred claims. *Id.* at 430-31.

Express provisions, constitutional or otherwise, are not, however a prerequisite for judicial prohibition on revival of time-barred claims, as evidenced by decisions of courts of sixteen jurisdictions (Arkansas, Florida, Illinois, Indiana, Kentucky, Louisiana, Maine, Nebraska, North Carolina, Oregon, Rhode Island, Pennsylvania, South Carolina, Utah, Virginia). *Id.* at 431.

by operation of the statute of limitations is as valuable a right as the right to bring the suit itself." *Wiley*, 641 So. 2d at 68; *Kelly*, 678 A.2d at 883; *Starnes*, 244 Va. at 212. That is because these statutes "are not only calculated for the repose and peace of society, but to provide against the evils that arise from loss of evidence and the failing memory of witnesses." *Id*. Because "[r]emedies are the life of rights, and are equally protected by the Constitution, [d]eprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away." *Id*. Highlighting the concerns about the integrity of the judicial system and defendants' rights, the court in *Wiley* has observed that "retroactively applying a new statute of limitations robs both plaintiffs and defendants of the reliability and predictability of the law." *Wiley*, 641 So. 2d at 68; *see also* Part I(C).

Second, it has long been established that it is "immaterial" "[t]hat the injured party may not at [the] time [of injury] comprehend the full extent of the damage." *Doe*, 364 S.C. at 352 (citation and internal quotation marks omitted). Thus, although "the torts of incest and abuse involve a myriad of social, psychological and legal variables that often prevent a person, particularly a minor, from immediately reporting these types of offenses," "[t]his does not mean . . . that [the legislature] may revive a cause of action that has already been barred by the expiration of the pre-existing statute of limitations." *Wiley,* 641 So. 2d at 67.

Finally, the legislature should not be allowed to arbitrarily wield its authority: "[o]nce barred, the legislature cannot subsequently declare that 'we change our mind on this type of claim' and then resurrect it." *Wiley,* 641 So. 2d at 68; *see also Starnes*, 244 Va. at 212. The legislature cannot, consistently with due process of law, be afforded the unconstrained power to revive claims when the political climate happens to be favorable, long after the underlying events allegedly occurred and after the time for bringing such claims has long passed.

F. Plaintiffs May Not Invoke CPLR 208(b) to Revive Formerly Barred Claims

Certain plaintiffs may contend that their previously time-barred claims should now be deemed timely even if the one-year revival window in CPLR 214-g violates the Due Process Clause. They may so argue, invoking CPLR 208(b), which provides that certain claims predicated on alleged sexual abuse may be asserted until the plaintiff reaches the age of 55. But CPLR 208(b) does not operate to revive previously time-barred claims in this manner. It operates prospectively only.

Unlike CPLR 214-g, which by its terms revives previously time-barred claims, CPLR 208(b) does not. It is a well-established principle of New York law, as stated by Justice Cardozo, that an amendment of the law will not revive previously time-barred claims if the legislature has not clearly and unequivocally expressed its intent to do so. *See In re World Trade Ctr. Lower Manhattan Disaster Site Litig.,* 66 F. Supp. 3d 466, 473 (S.D.N.Y. 2014) (citing *Hopkins v. Lincoln Trust Co.*, 233 N.Y. 213 (1922)), *vacated on other grounds,* 892 F.3d 108 (2d Cir. 2018); *35 Park Ave. Corp. v. Campagna*, 48 N.Y.2d 813, 815 (1979) (the intent of the legislature to "revive a claim already time barred . . . must be expressed clearly and unequivocally").[522] Here, under CPLR 208, an action may be commenced for alleged sexual

[522] In *Hopkins*, a fraud allegedly occurred on August 20, 1912; the statute of limitations then was six years. 233 N.Y. at 214. In 1920, after the expiration of the statute of limitations, the law was changed such that the statute of limitations for a fraud claim began to accrue not on the date of the fraud but on the date of the "discovery, by the plaintiff, or the person under whom he claims, of the facts constituting the fraud." *Id*. The underlying lawsuit was initiated on September 1, 1920. The plaintiff claimed that he did not discover the fraud until May 1, 1919—within the statute of limitations as amended by the legislature but outside of the statute of limitations as previously calculated. *Id.* at 215. The question before the Court was whether the amendment of the law, which was silent as to its application to previously time-barred claims, revived those claims.

The Court of Appeals concluded that it did not. Justice Cardozo observed that "[r]evival is an extreme exercise of legislative power" and the "will to work it is not deduced from words of doubtful meaning." *Id*. Rather, "[u]ncertainties are resolved against consequences so drastic."

abuse "against any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of said conduct, on or before the plaintiff or infant plaintiff reaches the age of fifty-five years." CPLR 208, unlike the language in CPLR 214-g, makes no mention of its application to claims that are already time-barred. Indeed, legislative history expressly confirms that this provision operates "prospectively" only.[523] Thus, plaintiffs cannot bring a lawsuit pursuant to CPLR 208 which was, as of the enactment of the CVA, previously time-barred.

In any event, for all of the reasons already discussed above, to the extent that CPLR 208(b) were interpreted to revive formerly time-barred claims, it would violate the Due Process Clause as interpreted by the Court of Appeals. The Court should interpret CPLR 208(b) to have prospective-only application to avoid that result, under the well-established principle that statutes should be construed to avoid constitutional issues. *See, e.g., Nat'l Ass'n of Indep. Insurers v. State*, 89 N.Y.2d 950, 951 (1997) (a court is "required to avoid interpreting [a statute] in a way that would render it unconstitutional if such a construction can be avoided") (citation and internal quotation marks omitted). Indeed, applying CPLR 208(b) to allow previously time-barred claims to be revived would present the very same Due Process problems as CPLR 214-g's express

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Id. Because the amendment did not indicate that it "revive[d] extinguished rights" the Court concluded that it only applied to "rights accrued but not extinguished." *Id.* at 216. Plaintiff's right to sue was extinguished when the statute of limitations expired as previously calculated on August 20, 1918. Thus, the Court reversed the Appellate Division decision and dismissed the complaint as time-barred. *Id.*

[523] *See, e.g.*, SENATE INTRODUCER'S MEM. IN SUPPORT OF LEGISLATION, S2440 at 1 (2019) ("This legislation would open the doors of justice to the thousands of survivors of child sexual abuse in New York State by *prospectively extending the statute of limitations to age 28 for charging felony sexual offenses, . . . and age 55 for bringing civil actions* . . . . This legislation would also establish a one-year window in which adult survivors of child sexual abuse would be permitted to file civil actions, even if the statute of limitations had already expired or, in the case of civil actions against public institutions, a notice of claim requirement had gone unmet.") (emphasis added).

revival of previously barred claims. *See* Part I(B). CPLR 208(b) should, accordingly, be interpreted to apply prospectively only; in particular, it does not allow plaintiffs with previously time-barred claims to now wait until they reach age 55 to assert those claims. Indeed, this would effectively extend what is, pursuant to CPLR 214-g, a one-year "window" for asserting previously time-barred claims for potentially decades.

* * *

In sum, the legislature does not have the constitutional authority to retroactively revive time-barred claims predicated on alleged sexual abuse. Nearly a hundred years of precedent is clear that claim revival is permitted only when there is an injustice of a type that makes a plaintiff legally unable to sue, *Robinson v. Robins Dry Dock & Repair Co.*, 238 N.Y. 271 (1924), physically unable to sue, *Gallewski v. Hentz & Co.,* 301 N.Y 164 (1950), or when the plaintiff could not have known about his injury until after the limitations period expired, *Matter of McCann v. Walsh Constr. Co.*, 282 App. Div. 444 (3d Dep't 1953), *aff'd without op.*, 306 N.Y. 904 (1954); *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487 (1989). In these unusual circumstances "the plaintiff could not have brought an action in a timely manner," *Doe v. Hartford Roman Catholic Diocese Corp.*, 317 Conn. 357, 433 n.58 (Conn. 2015), and the legislature may exercise its "extreme" authority to revive previously time-barred claims. *Hopkins*, 233 N.Y. at 215.

That standard has not been met. Allowing for the previously time-barred claims asserted against the Diocese here to be retroactively revived would entail overturning nearly 100 years of settled Court of Appeals precedent and rejecting the Court of Appeals' ruling in *Zumpano v. Quinn*, 6 N.Y.3d 666 (2006), that victims of child sexual abuse had the ability to sue within the previously applicable limitations period. To the extent that such a sea change in the law will

occur, the *only court* in New York with the power to undertake that is the Court of Appeals. This Court is bound in the meantime to follow that precedent. What follows in this memorandum of law are a series of additional grounds for dismissing certain categories of claims asserted against the Diocese in these actions. This Court need not reach any of these additional grounds. On this threshold ground under the Due Process Clause of the New York State Constitution, these lawsuits should be dismissed in their entirety because, under binding Court of Appeals authority, the legislature does not have the authority to revive the previously time-barred claims asserted.

II. ALTERNATIVELY, ALL CLAIMS THAT DO NOT ALLEGE INTENTIONAL OR NEGLIGENT CONDUCT BY THE DIOCESE ARE SUBJECT TO DISMISSAL BECAUSE THE LEGISLATURE DID NOT REVIVE THEM

CPLR 214-g revives "every civil claim or cause of action brought against any party alleging *intentional or negligent acts or omissions* by a person for physical, psychological, or other injury or condition suffered as a result of" specific child sexual abuse offenses. (emphasis added). *See also* CPLR 208(b) (authorizing claims "against any party whose intentional or negligent acts or omissions. . . ." constituted specific child sexual abuse offenses). Claims against the Diocese for alleged misconduct *other than* its intentional or negligent misconduct remain time-barred. These include: (1) any *respondeat superior* claim, based on (a) acts of individual perpetrators, such as assault, battery, intentional infliction of emotional distress and sexual battery of a child (*see* Part III for additional grounds for dismissal of these claims), (b) the breach of a non-delegable duty, and (c) the breach of N.Y. Soc. Serv. Law § 413 (*see* Part IV for additional grounds for dismissing this claim); and (2) any claim premised on conduct that is *not* intentional or negligent, such as recklessness or gross negligence. Many of the claims asserted against the Diocese should be dismissed on this ground.

First, under New York law a time-barred claim is revived only when the legislature expressly states its intent—in the relevant enactment—to revive the claim. *See In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 66 F. Supp. 3d 466, 473 (S.D.N.Y. 2014) (*citing Hopkins v. Lincoln Trust Co.,* 233 N.Y. 213 (1922)), *vacated on other grounds*, 892 F.3d 108 (2d Cir. 2018)); *35 Park Ave. Corp. v. Campagna,* 48 N.Y.2d 813, 815 (1979) (the legislature's intention to revive a claim must be "clearly and unequivocally" expressed). As Justice Cardozo emphasized in *Hopkins v. Lincoln Trust Co.*: "Revival is an extreme exercise of legislative power. The will to work it is not deduced from words of doubtful meaning. Uncertainties are resolved against consequences so drastic." 233 N.Y. 213, 215 (1922).

Second, the statutory language determines which claims are revived and which claims are not. The case law addressing CPLR 214-c illustrates this principle. That statute was enacted to extend the time for bringing toxic tort claims based on the date of discovery by the plaintiff, "in light of the inequities of imposing the usual date-of-injury rule on [such] plaintiffs who fail to discover their latent injuries within the limitations period." *Weissman v. Dow Corning Corp.,* 892 F.Supp. 510, 513 (S.D.N.Y. 1995). In CPLR 214-c(2), the legislature provided that "[n]otwithstanding the provisions of section 214, the three year period within which an action to recover damages for *personal injury or injury to property* caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier." (emphasis added). Although CPLR 214-c is a remedial statute enacted to enable individuals to bring toxic tort claims that

would otherwise be time-barred, the legislature limited the revived claims to "personal injury" claims and claims involving "injury to property," as provided in the statute.

Courts have consistently held that other claims, not set forth in the statute, remain time-barred even when they arise out of the same operative facts and involve the same injury. In *Matter of Plaza v. Estate of Wisser,* for example, the court held that although a plaintiff's negligence claim was timely under CPLR 214-c, his battery claim was time-barred because the statute "merely carves out an exception to when the three year statute of limitations applicable to personal injury actions begins to run . . . and has no application to intentional torts such as battery." 211 A.D.2d 111, 117-18 (2d Dep't 1995). Applying the same principle, the court held that plaintiff's fraud claim was time-barred because it is not an "action[] to recover damages for personal injury or injury to property." *Id.* at 118.

As this authority reflects, when the legislature choses to revive specified causes of action, it necessarily leaves time-barred all other—unspecified—claims: "[b]ecause the legislature chose to revive personal injury actions, a category of cases distinct under New York common law and statutes of limitations from actions for fraud, we do not think that Chapter 419 was intended to reach plaintiff's fraud cause of action." *Weissman v. Dow Corning Corp.,* 892 F. Supp. 510, 516 (S.D.N.Y. 1995). Indeed, as this court has observed: "CPLR 214-c applies only to personal injury claims and injury to property claims, and not to intentional torts or causes of action based on any other theory." *Conforti v. County of Nassau,* No. 600858/13, 2013 WL 6333552, at *3 (Sup. Ct. Nassau Cty. 2013).

Here, CPLR 214-g revives only claims based upon the Diocese's intentional or negligent acts. Claims that are vicariously asserted against the Diocese—for example, based on the doctrine of *respondeat superior*—remain time-barred. First, vicarious liability claims are not

listed in the revival statutes. The court's reasoning in *Weissman* (in the context of personal injury versus fraud actions) is directly applicable here: "limitations statutes clearly make a distinction between" intentional and negligent acts, on the one hand, and vicarious liability, on the other hand. *Id*. at 515. Thus, there is no revival of vicarious liability claims because "the legislature, presumably aware of those distinctions, did not explicitly include" vicarious liability actions within the scope of the revival provisions. *Id*. Second, "even apart" from the revival legislation's context, "under New York law," claims based on intentional or negligent acts, on the one hand, and vicarious liability, on the other, "are substantively distinct." *Id*. This is because claims asserted under the doctrine of *respondeat superior* arise in the absence of any intentional or negligent conduct of the allegedly vicariously liable employer. *See, e.g.*, *Ott v. Barash,* 109 A.D.2d 254, 261 (2d Dep't 1985) ("Under the doctrine of respondeat superior, an employer is vicariously liable for a tort committed by his employee while the latter is acting within the scope of his employment. . .[and] the vicariously liable employer, upon whom liability has been imposed without fault, may then seek indemnification, or reimbursement, from the primarily liable employee.").

For the same two reasons, claims against the Diocese sounding in recklessness are not revived by CPLR 214-g. First, the revival statutes make no mention of claims based on recklessness. *Weisman*, 892 F. Supp. at 515. Second, "even apart" from the revival legislation's context, "under New York law," claims based on intentional or negligent acts, on the one hand, and recklessness, on the other, "are substantively distinct." *Id*. Courts have explained that reckless conduct "borders on intentional wrongdoing and is 'different in kind and degree'" from negligence. *Lemoine v. Cornell Univ*., 2 A.D.3d 1017, 1020 (3d Dep't 2003) (citing *Sutton Park Dev. Corp. Trading Co. Inc. v. Guerin & Guerin Agency Inc*., 297 A.D.2d 430, 431 (3d Dep't

2002)). Recklessness is "culpability that 'falls within the middle range . . . something more than negligence but less than intentional conduct.'" *Chavis v. City of New York*, 94 A.D.3d 440, 443 (1st Dep't 2012) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)); *see also* RESTATEMENT (SECOND) OF TORTS § 500 cmt. f (1977) ("Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it."); *id*., cmt. g ("Reckless misconduct differs from negligence in several important particulars" including the form of misconduct and the degree of risk.). The legislature has not directed the judiciary to wade into this ambiguous "middle range" of liability, *Chavis,* 94 A.D.3d at 443, and the court therefore may not do so.

Likewise, claims asserted against the Diocese for gross negligence have not been revived by the CVA. First, CPLR 214-g makes no mention of claims based on gross negligence. *Weisman*, 892 F. Supp. at 515. Second, "even apart" from this specific statutory language, "under New York law," claims based on intentional or negligent acts, on the one hand, and grossly negligence acts, on the other, "are substantively distinct." *Id*. Again, gross negligence "differs in kind, not only degree, from claims of ordinary negligence" because it surpasses this well-defined standard. *Dolphin Holdings, Ltd. v. Gander & White Shipping, Inc*., 122 A.D.3d 901, 902 (2d Dep't 2014) (quoting *Colnaghi, U.S.A. v. Jewelers Protection Servs*., 81 N.Y.2d 821, 823 (1993)). Gross negligence constitutes a disregard for the safety of others that "occurs when a party proceeds in reckless disregard of the consequences of its acts." *Rand & Paseka Mfg. Co., Inc. v. Holmes Prot. Inc*., 130 A.D.2d 429, 430-31 (1st Dep't 1987). For example, in *Prato v. Vigliotta*, the court held that despite alleging that the defendants polluted an adjoining property through the discharge of gasoline from storage tanks on their property, plaintiffs' gross

negligence claim failed because there was no "evidence of any intentional or reckless acts or omissions . . . or of actual or constructive notice of any defects in the tanks." 253 A.D.2d 749, 750 (2d Dep't 1998). Where, as here, the legislature has revived claims based only on intentional and negligent acts, but did not revive claims based on reckless misconduct, gross negligence claims remain time-barred and are not deemed to have been revived by the CVA.

Courts in other jurisdictions have reached the same conclusion: child sexual abuse claims are revived only as to the specific causes of actions against the specific parties identified in the statute. For example, a state appellate court in Minnesota interpreted revival legislation that, in pertinent part, authorized an action "against a person who caused the plaintiff's personal injury either by (1) committing sexual abuse against the plaintiff, or (2) negligently permitting sexual abuse against the plaintiff to occur." *Oelschlager v. Magnuson*, 528 N.W.2d 895, 900-02 (Minn. Ct. App. 1995). The court held that the statute did not permit a lawsuit against an employer under the doctrine of *respondeat superior* because no such claim was revived in the statute. *Id*. It took a separate legislative amendment, enacted after *Oelschlager*, to revive *respondeat superior* claims. *See Schaefer v. Cargill Kitchen Sols., Inc*., No. 16-cv-0154, 2016 WL 6570240, at *5 (Minn. Ct. App. Nov. 7, 2016) (observing that the Minnesota legislature subsequently amended the statute to expressly allow claims on the basis of vicarious liability).

Likewise, a California appellate court has held that a plaintiff suing for alleged sexual abuse may sue only the specific individuals or entities that the statute enumerates. In interpreting legislation reviving claims against a party "on notice of any unlawful sexual conduct by an employee, volunteer, representative, or agent," the court held that the statute did not revive a claim against a mother for her knowledge of and involvement in sexual abuse by a father. *Aaronoff v. Martinez-Senftner,* 136 Cal. App. 4th 910, 922-23 (Cal. Ct. App. 2006). The court

explained that by its terms, "the statute applies to assaults that are related to the perpetrator's employment, or that are made more likely by the nature of the perpetrator's work and the fact of the perpetrator's continued employment." *Id*. The court concluded that "[t]he language [of the legislation] clearly does not apply to the parental relationship." *Id*. at 922.

Accordingly, all vicarious liability claims against the Diocese and all claims premised on any conduct other than intentional or negligent conduct ought to be dismissed as outside the statute of limitations. These include all claims premised on actions of individuals, such as assault, battery, sexual battery of a child and intentional infliction of emotional distress. A legal entity such as the Diocese can be held responsible for the intentional acts of individuals only through *respondeat superior* liability. (*See also* Part III for additional grounds for dismissal of these claims.) The *respondeat superior* category also includes claims for breach of non-delegable duty, under which an employer may be held liable for delegating a duty that an employer "should not be permitted to transfer . . . to another." *See Kleeman v. Rheingold*, 81 N.Y.2d 270, 273, 275 (1993) (holding that a lawyer could not delegate service of process and noting that breach of non-delegable duty typically functions as an exception to non-liability of employers for actions of independent contractors). In addition, the Diocese cannot be held vicariously liable to the extent any individual is determined to have been a mandated reporter under N.Y. Soc. Serv. Law § 413, who failed to fulfill his statutory obligations. (*See also* Part IV for additional grounds for dismissal of this claim.) Finally, any counts based on reckless conduct or gross negligence are also subject to dismissal as they are neither intentional nor negligent claims.

III. ALL VICARIOUS LIABILITY CLAIMS AGAINST THE DIOCESE, PREMISED ON ALLEGED INTENTIONAL MISCONDUCT BY INDIVIDUALS, FAIL TO STATE A CLAIM AS A MATTER OF LAW

In addition to not having been revived, *see* Part II, all vicarious liability claims asserted against the Diocese that are premised on actions of individual perpetrators fail to state a claim as a matter of law.

A. All Alleged Intentional Acts By The Individual Perpetrators Were Outside The Scope Of Their Employment

All intentional misconduct claims asserted against the Diocese, such as assault, battery, intentional infliction of emotional distress,[524] and sexual battery of a child, fail to state a claim against the Diocese as a matter of law. These claims, based on alleged intentional acts of individual perpetrators, can only be asserted against the Diocese by way of *respondeat superior* liability. And that fails, in turn, because the alleged acts were not in the scope of the employment of the alleged individual perpetrators. *See*, *e.g.*, *Cornell v. State of New York*, 46 N.Y.2d 1032,1033 (1979) ("liability for acts of an employee may generally be imposed upon the employer pursuant to the doctrine of respondeat superior if the employee was acting within the scope of his employment").

"[T]o hold the church vicariously liable under the doctrine of respondeat superior" for an intentional tort committed by an individual, such as assault, battery, intentional infliction of

[524] Some complaints assert "outrage" and plead it in the same count as the intentional infliction of emotional distress. "Outrage" is not an independent cause of action, but rather is an element of intentional infliction of emotional distress. *See, e.g.*, *Chanko v. Am. Broad. Companies Inc*., 27 N.Y.3d 46, 56 (2016) (The "four elements of a cause of action for intentional infliction of emotional distress [are]: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress") (internal quotations omitted). Accordingly, "outrage" is subject to dismissal because it is not a separate cause of action from intentional infliction of emotional distress, which, in turn, is subject to dismissal for several independent reasons, *see* Part III(A) & (B).

emotional distress, or sexual battery of a child, plaintiffs must plead facts sufficient to establish the prerequisites under that doctrine. *See, e.g., Spielman v. Carrino*, 77 A.D.3d 816, 818 (2d Dep't 2010) (dismissing a claim for intentional infliction of emotional distress against church defendant for alleged sexual assault by its pastor). Thus, under the *respondeat superior* doctrine, an employer may be liable for an employee's tortious sexual misconduct if it occurred (i) within the scope of employment; and (ii) in furtherance of the employer's business. *See N.X. v. Cabrini Med. Ctr.*, 97 N.Y.2d 247, 251 (2002). These requirements cannot be met here because sexual misconduct, including and especially against minors, is not within the scope of employment, as numerous courts have held as a matter of law.

Sexual assault is "a clear departure from the scope of employment, having been committed for wholly personal motives" and "not in furtherance of [an employer's] business." *N.X.,* 97 N.Y.2d at 251. Thus, an employer cannot be held vicariously liable for an employee's sexual assault. *See id.; see also Kunz v. New Netherlands Routes, Inc*., 64 A.D.3d 956, 958 (3d Dep't 2009) (collecting cases); *Jones by Jones v. Trane*, 591 N.Y.S.2d 927, 932-33 (Sup. Ct. Onondaga Cty. 1992) (observing that "[n]o New York case has been cited in which an employer has been held vicariously liable for intentional sexual misconduct by an employee"). New York courts "consistently have held that sexual misconduct and related tortious behavior arise from personal motives and do not further an employer's business, even when committed within the employment context." *Doe v. Alsaud,* 12 F. Supp. 3d 674, 677-78 (S.D.N.Y. 2014) (collecting cases). Likewise, courts have repeatedly held that sexual abuse of minors by church employees occurs outside the scope of employment and does not further an employer's interests. *See, e.g.*, *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 161 (2d Dep't 1997) (citing precedent and noting that the Supreme Court dismissed a vicarious liability claim against

the Diocese of Brooklyn for alleged childhood sexual abuse by a priest); *Paul J.H. v. Lum*, 291 A.D.2d 894, 895 (4th Dep't 2002) (no *respondeat superior* liability against diocese for sexual abuse of a minor by a priest). Thus, plaintiffs cannot meet the requirements of alleging claims for intentional conduct by the Diocese pursuant to the *respondeat superior* doctrine.

Accordingly, courts dismiss claims, such as the ones plaintiffs have asserted here, against employers (including churches), based on alleged intentional acts of sexual abuse committed by individuals as they "act[ed] outside the scope of [their] employment." *See, e.g.*, *Spielman*, 77 A.D.3d at 818 (dismissing intentional infliction of emotional distress claim); *Mataxas v. N. Shore Univ. Hosp.*, 211 A.D.2d 762, 763 (1995) ("Therefore, as a matter of law, the hospital may not be held vicariously liable for the acts of the technician" in assaulting and sexually abusinga hospital patient); *Kunz*, 64 A.D.3d at 958 (affirming dismissal of sexual assault and battery claims under *respondeat superior* doctrine because those acts are outside the scope of employment); *Pinks v. Turnbull*, 2009 WL 4931802, at *4 (Sup. Ct. New York Cty. 2009) (Boys' Choir of Harlem is not "responsible pursuant to a theory of respondeat superior for [sexual assault and battery of a minor committed by] its employee . . ., [as these acts] were clearly outside the scope of his employment" (citing *N.X.* and *Kenneth R.*)). All such claims should be dismissed here as well.

B. Intentional Infliction Of Emotional Distress Claims Also Must Be Dismissed As Impermissibly Duplicative

Claims against the Diocese for intentional infliction of emotional distress are subject to dismissal not only because such claims have not been revived by the legislature (Part II) and because the alleged individual actions were outside the scope of their employment (Part III(A)). In addition, claims for intentional infliction of emotional distress are impermissibly duplicative of plaintiffs' other tort claims.

Intentional infliction of emotional distress is a "theory of recovery that is to be invoked only as a last resort" where "traditional theories of recovery" do not apply. *McIntyre v. Manhattan Ford, Lincoln-Mercury*, 256 A.D.2d 269, 270 (1st Dep't 1998); *see also Vione v. Tewell*, 820 N.Y.S.2d 682, 687-88 (Sup. Ct. New York Cty. 2006). It is "well settled that a cause of action [for intentional infliction of emotional distress] should not be entertained where the conduct complained of falls well within the ambit of other traditional tort liability." *See Butler v. Delaware Otsego Corp*., 203 A.D.2d 783, 784-85 (3d Dep't 1994) (internal quotations and citation omitted). New York law is clear that an intentional infliction of emotional distress claim must be dismissed where other tort claims are available. *See, e.g., Demas v. Levitsky*, 738 N.Y.S.2d 402, 409 (3d Dep't 2002) (citing *Fisher v. Maloney,* 43 N.Y.2d 553, 558 (1978)). Here, every enumerated complaint against the Diocese alleges that the Diocese is liable under other tort theories, and this litigation does not present the unusual situation where a claim for intentional infliction of emotional distress is appropriate. Thus, plaintiffs' pleading of other tort claims under "traditional theories of recovery" is the third independent basis for dismissal of these claims.

IV. THE REPORTING STATUTE, N.Y. SOC. SERV. LAW § 413, DOES NOT COVER THE DIOCESE AND ITS EMPLOYEES, AND THUS, A CLAIM FOR ITS VIOLATION OUGHT TO BE DISMISSED

Several plaintiffs assert that the Diocese should be held liable for an alleged violation of New York Social Services Law § 413(a). This is a reporting statute that enumerates the categories of individuals and officials that fall within its coverage. Under that provision, only specific persons and officials, including any physician, licensed mental health counselor, or school official, are "required to report or cause a report to be made . . . when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child . . ." based upon information provided by "the parent,

guardian, custodian or other person legally responsible for such child." After making this report of abuse or suspected abuse, the reporter is required to "immediately notify the person in charge of such institution, school, facility or agency," and the "person in charge [of that organization], or the designated agent of such person, shall be responsible for all subsequent administration necessitated by the report." N.Y. Soc. Serv. Law § 413(b). Section 413 requires that only one report be made. *Id*. ("Nothing in this section or title is intended to require more than one report from any such institution, school or agency"). The law penalizes the failure to make a required report, and provides for civil liability. *See* N.Y. Soc. Serv. Law § 420.

First, the list of mandated reporters under N.Y. Soc. Serv. Law § 413(a) is comprehensive and does not extend to employees of the Diocese. In *Monaghan v. Roman Catholic Diocese of Rockville Centre*, the Second Department observed that to state a claim under N.Y. Soc. Serv. Law § 413 a plaintiff must "allege that [a] member or employee of the Diocese is a mandated reporter," and otherwise no claim can be asserted. 165 A.D.3d 650, 653 (2d Dep't 2018) (reversing and granting dismissal of public nuisance cause of action predicated in part on Diocese's failure to report). Here, no such allegations have been made other than in a conclusory fashion.[525] Indeed, no defendant in any pending action is specifically alleged to be a mandated reporter and thus, as in *Monaghan*, the claim ought to be dismissed.

Second, N.Y. Soc. Serv. Law § 413(a) only imposes an obligation on mandated reporters to report abuse, and no such obligation is imposed on institutions, which are directed to assist

[525] *See, e.g.*, *Brian O'Hara v. The Diocese of Rockville Centre et al.,* Index No. 615735/2019 (Sup. Ct. Suffolk Cty. 2019) NYSECF Doc. No. 5 ¶ 221 ("Pursuant to N.Y. Soc. Serv. Law §§ 413 and 420, the Diocese had a statutorily imposed duty to report reasonable suspicion of abuse of children in its care."). The Diocese has no such mandatory reporting duty, and there is no specification here or in the other complaints identifying the category of alleged mandatory reporters.

with "all *subsequent* administration necessitated by the report." *See* N.Y. Soc. Serv. Law § 413(b) (emphasis added). This provision is inapplicable because none of the complaints allege that any report was ever made and thus, no duty to assist by the Diocese was triggered. *Finally*, to the extent that any employee of the Diocese is a mandated reporter and failed to make a report—which, again, is not alleged in the complaints that present these claims—the Diocese cannot be held vicariously liable under the doctrine of *respondeat superior* because such a claim is not revived by CPLR 208(b) and CPLR 214-g. *See* Part II.

V. CERTAIN CLAIMS FOR BREACH OF FIDUCIARY DUTY ARE SUBJECT TO DISMISSAL AS THEY FAIL TO ALLEGE THE EXISTENCE OF SUCH A DUTY

Many claims for breach of fiduciary duty against the Diocese are subject to dismissal because the allegations are not sufficiently particularized, and alleging abuse as a child-parishioner, even if one participated in special church activities, is not sufficient to survive a motion to dismiss.

A fiduciary relationship may exist where "one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge." *Doe v. Holy See (State of Vatican City)*, 793 N.Y.S.2d 565, 568 (3d Dep't 2005) (quoting *WIT Holding Corp. v. Klein*, 724 N.Y.S.2d 66, 68 (2d Dep't 2001)). "A cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016(b)." *Swartz v. Swartz*, 44 N.Y.S.3d 452, 460 (2d Dep't 2016). As a general matter, "[s]exual misconduct is not a breach of fiduciary duty." 92 N.Y. JUR. 2D RELIGIOUS ORGANIZATIONS § 90 (2019). The sexual abuse of a child does not typically implicate "a special 'fiduciary' duty" because what is at issue is "the general duty to refrain from violating penal laws." *Wilson v. Diocese of N.Y. of the Episcopal Church*, No. 96-cv-2400, 1998 WL 82921, at *11 (S.D.N.Y. Feb. 26, 1998) (quoting *Schmidt v. Bishop*, 779 F.Supp. 321, 325-26 (S.D.N.Y. 1991)). Only in limited circumstances will sexual misconduct

implicate more than a general obligation not to commit a crime. *See Wilson*, 1998 WL 82921 at *11 (distinguishing a fiduciary duty from "that trust one normally places in others not to commit a crime").

Where, as here, plaintiffs seek to impose a fiduciary relationship on the Diocese as a predicate for liability, it is the plaintiffs' burden to demonstrate that the alleged sexual misconduct violated a fiduciary obligation and that this is not merely the recasting of an intentional tort claim. Each plaintiff must allege facts demonstrating that his or her relationship with the Diocese was "somehow unique or distinct" from the Diocese's relationship with other parishioners generally. *See Doe*, 793 N.Y.S.2d at 568; *see also id.* at 570 (Peters, J., dissenting) (agreeing with the majority that a fiduciary relationship between a church and its parishioners must be "unique from that shared by other parishioners generally"). Plaintiffs also cannot merely rely on the Diocese's status as a religious institution. *See id.* at 568.

In *Doe v. Holy See (State of Vatican City)*, plaintiffs alleged that when they were child parishioners at the defendant churches, they were sexually abused by priests there. *Id*. at 568–69. To circumvent the expired statute of limitations, plaintiffs argued equitable estoppel; one of its elements is a fiduciary relationship with defendants. Plaintiffs alleged that there was such a fiduciary relationship with the church defendants because the defendants provided pastoral services to plaintiffs and their immediate families, held themselves out as religious educational institutions, and maintained instructional programs for children, in which some of plaintiffs participated. *Id*. at 569. The court affirmed dismissal of the complaints as untimely, explaining that the allegations failed to show that a fiduciary relationship existed: the record was "wholly devoid of any indication that plaintiffs' relationships with defendants were unique or distinct from defendants' relationships with other parishioners." *Id*. The court so held, in disagreement

with the dissent which argued that the allegations that some plaintiffs "were singled out for individualized instruction or specialized attention," and that "their families allowed them to participate in the church-sponsored or extracurricular activities," were sufficient to show a "unique" relationship giving rise to fiduciary duty. *Id*. at 570 (Peters, J., dissenting). In a companion case, the court likewise held that church defendants' "sponsorship of religious and educational programs for its minor parishioners, [] was not, in itself, sufficient to create a fiduciary relationship with plaintiff[.]" *Doe*, 793 N.Y.S.2d at 573; *see also, e.g.*, *Mazzarella v. Syracuse Diocese*, 953 N.Y.S.2d 436, 437 (4th Dep't 2012) (citing *Mars v. Diocese of Rochester*, 6 A.D.3d 1120, 1121 (4th Dep't 2004); both cases reject the existence of a fiduciary duty in the context of alleged abuse by a priest of a minor parishioner).

Here, the identified complaints contain only bare allegations that fail to demonstrate the existence of a unique relationship between the Diocese and the plaintiffs. These complaints only contain "boilerplate" allegations, *Doe*, 793 N.Y.S.2d at 568, that, for example, "[t]here exists a fiduciary relationship of trust, confidence and reliance between Plaintiff and Defendant[] Diocese of Rockville Centre."[526] These allegations do not even rise to the level of detail of those in *Doe v. Holy See*, which dismissed the complaints. *A fortiori*, plaintiffs fail to carry their burden here to demonstrate they had a fiduciary relationship with the Diocese. The failure to adequately allege that the Diocese had "actual or constructive knowledge" of any alleged perpetrator's "sexual proclivities" is also fatal to this claim. *See Ehrens v. Lutheran Church,* 385 F.3d 232, 236 n.2 (2d Cir. 2004); Part VI(A) (discussing lack of notice).

Thus, as courts have repeatedly done in similar circumstances and with complaints more

[526] *See, e.g., Kathleen Gallagher-Smith v. The Roman Catholic Diocese of Rockville Centre et al.,* Index No. 611155/2019 (Sup. Ct. Suffolk Cty. 2019) NYSECF Doc. No. 1 ¶ 50.

detailed than the ones here, the identified claims for breach of fiduciary duty must be dismissed.

VI. CERTAIN NEGLIGENCE CLAIMS ARE SUBJECT TO DISMISSAL

A. Some Plaintiffs Fail To Adequately Plead Negligent Hiring, Negligent Retention, Negligent Supervision, Or Negligent Training, Instead Effectively Attempting To Impose Strict Liability

Plaintiffs' claims for negligent hiring, negligent retention, negligent supervision and negligent training in the cases identified should be dismissed for failure to state a claim, especially where there are no sufficient allegations that the Diocese knew of its employees' propensity to commit sexual abuse of minors.[527] Typically, no basis for such knowledge, constructive or actual, is alleged. What some plaintiffs do instead is to claim that the Diocese was in a position such that it ought to have known. Without any factual predicate, this amounts to seeking to hold the Diocese strictly liable for misconduct by its employees. That is not, however, the proper standard for imposing liability. On the proper standard—negligence—these claims run into two independent fatal obstacles. First, in certain cases the plaintiffs fail to adequately allege that the Diocese "knew or should have known" that the alleged perpetrator posed a risk of sexual abuse. Second, in the identified cases the alleged abuse either did not occur on church property or plaintiffs have failed to adequately allege where the abuse occurred.

Under New York law, a claim for negligent hiring, negligent retention, or negligent supervision must allege the "standard elements of negligence" and, *in addition*, the plaintiff must show: "(1) that the tort-feasor and the defendant were in an employee-employer relationship; (2) that the employer 'knew or should have known of the employee's propensity for the conduct which caused the injury' prior to the injury's occurrence; and (3) that the tort was committed on

[527] Under New York law, a negligent monitoring claim is no different than a claim for negligent supervision. *See, e.g., Colon v. Jarvis,* 292 A.D.2d 559, 560-61 (2d Dep't 2002).

the employer's premises or with the employer's chattels." *Ehrens v. Lutheran Church*, 385 F.3d 232, 235 (2d. Cir. 2004) (citation and internal quotations omitted). Courts applying New York law apply the same legal standard to negligent training, negligent hiring, negligent retention, and negligent supervision.[528] These claims should be dismissed for two reasons.

First, the identified complaints do not allege facts sufficient to assert that the Diocese "knew or should have known" about any employee's propensity to commit sexual abuse, as numerous cases have held in dismissing similarly improperly asserted claims. *See Ehrens,* 385 F.3d at 235; *Shu Yuan Huang v. St. John's Evangelical Lutheran Church*, 129 A.D.3d 1053, 1054 (2d Dep't 2015) (dismissing negligent hiring, negligent retention, and negligent supervision claims where the complaint "failed to sufficiently allege that the defendants knew or should have known of . . . [an employee's] propensity . . . to commit the alleged wrongful acts"). Several key principles on the meaning of that standard have emerged from the decisions on suits against employers based on allegations of sexual abuse by their employees. As a background principle, a defendant "generally has no duty to control the conduct of third persons so as to prevent them

[528] *See, e.g., Stevens v. Webb*, No. 12-CV-2909, 2014 WL 1154246, at *12 (E.D.N.Y. Mar. 21, 2014) ("Under New York law, a claim for negligent hiring, training, and supervision, 'in addition to the standard elements of negligence,' requires 'a plaintiff [to] show (1) that the tortfeasor and the defendant were in an employee-employer relationship; (2) that the employer knew or should have known of the employee's propensity for the conduct which caused the injury prior to the injury's occurrence; and, (3) that the tort was committed on the employer's premises or with the employer's chattels.'") (citation omitted); *see also Mizrahi v. City of New York*, No. 15-cv-6084, 2018 WL 3848917, at *29 (E.D.N.Y. Aug. 13, 2018) (same); *DeJesus v. DeJesus*, 132 A.D.3d 721, 722 (2d Dep't 2015) ("To establish a cause of action based on negligent supervision, hiring, or training, a plaintiff must establish that the employer knew or should have known that the employee had violent propensities. . . or a propensity for the conduct which resulted in the plaintiffs' alleged injuries."); *Hicks ex rel. Nolette v. Berkshire Farm Ctr. & Servs. for Youth*, 123 A.D.3d 1319, 1320 (3d Dep't 2014) ("[T]o succeed on a claim of negligent training and supervision of an employee, it must be demonstrated that the employer knew or should have known of the employee's propensity for the conduct which caused the injury. . . and that the allegedly deficient supervision or training was a proximate cause of such injury.") (citation omitted).

from harming others." *Ehrens,* 385 F.3d at 235 (granting religious institutions' motion for summary judgment regarding liability for pastor's sexual abuse of child) (citation and internal quotations omitted); *see also Jonathan A. v. Bd. of Educ. of City of New York*, 8 A.D.3d 80, 81 (1st Dep't 2004) (granting school's motion for summary judgment regarding liability for sexual abuse of child during after-school program).

Another established guidepost is that an employer "is under no duty to inquire as to whether an employee has been convicted of crimes in the past. Liability will attach on such a claim only when the employer knew or should have known of the employee's violent propensities." *Estevez-Yalcin v. Children's Vill.*, 331 F. Supp. 2d 170, 175 (S.D.N.Y. 2004) (citation and internal quotations omitted). "[P]ersonal intuition" is insufficient, "as is the general proposition that sexual abuse of children is a pervasive problem in society today, to constitute a factual basis upon which to charge any of these defendants with notice that [the scout leader] posed a danger as a sexual predator to the boys in his charge." *Steinborn v. Himmel*, 9 A.D.3d 531, 534 (3d Dep't 2004); *see also Ehrens,* 385 F.3d at 235 (granting religious institutions' motion for summary judgment where there was no "admissible evidence from which a reasonable juror could infer that the defendants, at any time prior to the relevant [sexual abuse] incident, knew or should have known of [perpetrator's] propensity to assault minors or otherwise to engage in inappropriate sexual conduct"); *Murray v. Research Found. of State Univ. of N.Y.,* 723 N.Y.S.2d 805, 807 (4th Dep't 2001) (granting employer's motion for summary judgment where employer "neither knew nor had reason to know that [employee] posed a risk to children"); *KM v. Fencers Club, Inc.*, 164 A.D.3d 891, 893 (2d Dep't 2018) (granting after-school organization's motion for summary judgment where "there was no evidence that [it] had

knowledge of any facts that would have caused a reasonably prudent person to conduct a criminal background check" on its employee).

Furthermore, where a perpetrator is alleged to have a "predisposition for sexual violence" his employer can only be held liable where such violence occurred *prior* to the harm at issue and his employer "knew or should have known" of such misconduct. *Doe v. Alsaud,* 12 F. Supp. 3d 674, 680 (S.D.N.Y. 2014) (granting employer's motion to dismiss claims regarding employee's alleged rape of plaintiff). In that case, plaintiff alleged that her assailant had a "predisposition for sexual violence" and that "[a] reasonable background check would have reflected the same." *Id*. Yet, she did not "allege (i) a single prior act or allegation of sexual misconduct committed by [assailant]; or (ii) a fact suggesting that [the employer] knew or should have known of any such prior acts." *Id*. "The absence" of these factual allegations was "fatal" to plaintiff's negligence claim. *Id*. Likewise, in instances where Diocese personnel "served for many years . . . without incident or complaint" plaintiffs may not properly assert that the Diocese had knowledge of their criminal propensities. *Steinborn v. Himmel*, 9 A.D.3d 531, 533–34 (3d Dep't 2004).

Moreover, any allegation that the Diocese had knowledge of lesser misconduct by its employees is insufficient to establish that the Diocese was aware of a propensity to commit the heinous crime of sexual abuse of a minor. *See Alsaud*, 12 F. Supp. 3d at 681 (collecting cases holding that an employer has notice of the likelihood of a harm only where the prior misconduct is "of the same kind that caused the injury"). Thus, for example, "[e]ven assuming [a] defendant[] [is] aware of [a scout leader's] alleged improper use of alcohol and cigarettes" while this is "relevant to [his] qualifications as a scout leader," it is "insufficient as a matter of law to constitute notice. . .that there was a danger of [him] sexually assaulting plaintiffs." *Steinborn*, 9 A.D.3d at 534.

Courts have also been clear that such knowledge, constructive or otherwise, does not exist where the propensity of a perpetrator to commit child sexual abuse would not have been apparent through a background check. An employer cannot be held liable in this circumstance because, by definition, it could not have known about the likelihood of harm. *See Estevez-Yalcin*, 331 F. Supp. 2d at 174 (granting county's motion for summary judgment regarding liability for volunteer's sexual abuse of children in treatment and rehabilitation facility); *K.I. v. New York City Bd. of Educ.,* 683 N.Y.S.2d 228, 230 (1st Dep't 1998) (granting board of education's motion for summary judgment where "a routine background check would not have revealed [school volunteer's] propensity to molest minors").

In particular, courts have repeatedly affirmed that a religious institution is under "no common-law duty to institute specific procedures for hiring employees *unless* the [institution] knows of facts that would lead a reasonably prudent person to investigate the prospective employee." *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 163 (2d Dep't 1997) (emphasis added); *see also, e.g.*, *Bouchard v. New York Archdiocese*, 719 F. Supp. 2d 255, 261-62 (S.D.N.Y. 2010) (citing *Kenneth R*. and collecting cases holding that an employer who has no reason to believe an employee will engage in sexual misconduct has no duty to investigate him; granting church institutions' motion for summary judgment regarding visiting priest's alleged sexual abuse of parishioner). Although there have been well-publicized problems with child sexual abuse, religious organizations are not required to screen their employees differently than other employers. To suggest otherwise "carries. . . discriminatory overtones against individuals merely because they have been ordained to the priesthood." *Kenneth R.*, 229 A.D.2d at 164 n.*.

Unable to allege any factual predicate for their claims that that the Diocese "should have known" that specific individuals were likely to commit sexual abuse,[529] as required by the case law, many plaintiffs resort to boilerplate and conclusory allegations.[530] That does not suffice to state any claim for negligence. It is, rather, an attempt to hold the Diocese strictly liable for the conduct of others. Such a work-around of the negligence requirements is not permissible, either substantively or procedurally. Substantively, the legal standard for negligence is *not* strict liability. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 24 (2001) (distinguishing the liability for physical harm under a negligence standard and a strict liability standard). As one court explained in the context of an attempt to hold a hospital liable under a negligent supervision theory for a sexual assault of a patient by its employee, "the mere theoretical possibility of [criminal] conduct" cannot substitute for actual or constructive knowledge by an employer of an employee's propensity to engage in such conduct. *N. X. v. Cabrini Med. Ctr*., 280 A.D.2d 34, 43 (1st Dep't 2001), *aff'd as modified*, 97 N.Y.2d 247 (2002). That would impermissibly "reclassify the contours of foreseeability [and] alter long-standing principles in this area of jurisprudence." *Id*. As such, a bare allegation that the Diocese "knew or should have known" goes even further than the theory plaintiff advocated in *N.X*. and which

[529] *See, e.g., JJSB Doe v. Diocese of Rockville Centre et al.,* Index No. 900046/2019 (Sup. Ct. Nassau Cty. 2019) NYSECF Doc. No. 1 ¶ 51 ("Defendants GOOD SHEPHERD and the DIOCESE, by and through their agents, servants, and/or employees, knew or reasonably should have known that Moore was capable of committing sexual violence against Plaintiff and/or other children."). No further details are provided regarding the basis for such knowledge in this or other enumerated complaints.

[530] *See, e.g., Kathleen Gallagher-Smith v. The Roman Catholic Diocese of Rockville Centre, New York et al*., Index No. 611155/2019 (Sup. Ct. Suffolk Cty.) NYSECF Doc. No. 1 ¶ 22 ("Defendant[] Diocese of Rockville Centre . . . knew or should have known of Father Keyes' propensity for the conduct which caused Plaintiff's injuries prior to, or about the time of, the injuries' occurrence."). This allegation of general knowledge does not indicate that the Diocese had any knowledge about the individual alleged to have committed sexual abuse.

the court decisively rejected. Making the Diocese strictly liable turns it into a universal insurer, eviscerating not only the foreseeability requirement, but also the negligence standard that governs such claims. Moreover, as noted above, religious organizations are not to be treated differently than other employers and cannot be subject to liability under a strict liability theory where no other organization would be. In any event, there is a procedural bar as well: strict liability claims have not been revived by the legislature. *See* CPLR 208(b) (reviving civil claims specifically limited to "intentional or negligent acts or omissions"); CPLR 214-g (same)*; see* Part II.

Finally, in the identified cases the alleged conduct is not alleged to have occurred on property owned by the Diocese or with the use of its chattels. *See Ehrens,* 385 F.3d at 236 (dismissing negligent supervision claim where the alleged abuse did not occur on church property).[531] In other cases there is also an insufficient "nexus" between the tortfeasor's employment by the Diocese and the sexual abuse that occurred such that they are "severed by time, distance, and [other] intervening independent actions." *Anonymous v. Dobbs Ferry Union Free Sch. Dist*., 290 A.D.2d 464, 465 (2d Dep't 2002) (granting school district's motion to dismiss claims regarding alleged liability for employee's sexual abuse of siblings at their home); *K.I.*, 256 A.D.2d at 192 (granting board of education's motion for summary judgment regarding sexual abuse of student by school volunteer where abuse occurred outside of school). As the *Sheila C. v. Povich* court explained, "expand[ing] the duty of care" to include circumstances where there is an attenuated connection between an employer and an employee would create a

[531] *See, e.g., Ark3 Doe v. Diocese of Rockville Centre et al.,* Index No. 900010/2019 (Sup. Ct. Nassau Cty. 2019) NYSECF Doc. No. 1 ¶ 19 ("From approximately 1979 to 1983, when Plaintiff was approximately 10 to 14 years old, Fr. Soave engaged in unpermitted sexual contact with Plaintiff"). There is no specification here or in the other enumerated complaints of where the alleged misconduct occurred.

"grave risk" of "a prohibitive number of lawsuits and concomitant liability." 11 A.D.3d 120, 129 (1st Dep't 2004). As such, any claim involving abuse that did not occur on church property or where the relationship between the Diocese and the tortfeasor is attenuated must be dismissed.

For these reasons, the claims of negligent hiring, negligent retention, negligent supervision and negligent training identified in the accompanying affirmation should be dismissed.

B. Certain General Negligence Claims Should Be Dismissed As There Is No Duty Alleged, And Any Such Claim Premised On The Same Facts As Negligent Hiring, Retention, Supervision And Training Is Subject To Dismissal

The "threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff?" *Kunz v. New Netherlands Routes, Inc.*, 64 A.D.3d 956, 957 (3d Dep't 2009) (quoting *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232 (2001)). "[I]n the absence of duty, there is no breach and without a breach there is no liability" for negligence. *See Sheila C.*, 11 A.D.3d at 124-29 (granting employer's motion to dismiss negligence claim regarding employee's alleged sexual assault of child); *see also O'Neil v. Roman Catholic Diocese of Brooklyn*, No. 6189/07, 2011 WL 1587753, at *12–13 (Sup. Ct. Kings Cty. 2011), *aff'd*, 949 N.Y.S.2d 447 (2d Dep't 2012) (granting religious institutions' motion for summary judgment regarding priest's alleged sexual abuse of child).

Plaintiffs cannot state a claim for negligence where, as in the complaints specified for the Court in the accompanying affirmation, they merely gesture at the possibility that some duty exists without explaining what it is. *See Sheila C.*, 11 A.D.3d at 125 (observing that allegations of sexual abuse must be adequately pleaded and "as former Chief Judge Cardozo once noted, 'proof of negligence in the air, so to speak, will not do'") (citation and internal quotations omitted); *Pinks v. Turnbull*, No. 100228/04, 2009 WL 4931802, at *4 (Sup. Ct. New York Cty.

Dec. 11, 2009) ("[R]umors, guess work, musings in hindsight, speculation or intuition" regarding what an employer knew or should have known are insufficient) (citation and quotations omitted).[532]

Courts applying New York law have repeatedly held that an employer does not owe a general duty to protect the public from the possibility of sexual violence by its employees. *See Kenneth R.,* 229 A.D.2d at 163 (granting religious institution's motion to dismiss claims regarding priest's sexual abuse of children); *Sheila C.,* 11 A.D.3d at 124-29 (granting employer's motion to dismiss negligence claim regarding employee's alleged sexual assault of child); *N. X.*, 280 A.D.2d at 40-45 (granting medical institution's motion for summary judgment regarding alleged sexual assault by physician). The allegations at issue concern the conduct of individuals who acted outside of the control of the Diocese, contrary to its organizational principles, in a manner that is antithetical to the religious purpose of the church and its congregants, and in violation of the law. The Diocese did not have the power to deter conduct that was unknown to it. *See Kenneth R.,* 229 A.D.2d at 163. *See* Part VI(A).

There is neither support in the case law nor in policy considerations for creating a broad and unbounded duty owed by the Diocese to prevent the despicable harm alleged in these cases. Such an expansive concept of duty would create a "likelihood of unlimited or insurer-like liability." *Sheila C.*, 11 A.D.3d at 126 (quoting *Palka v. Servicemaster Mgt. Servs. Corp.,* 83 N.Y.2d at 579, 586 (1994)). Imposing a duty to prevent conduct which is illegal, completely contrary to an employee's responsibilities, and fundamentally condemned by his employer would

[532] *See, e.g., Paul Mazzola v. Diocese of Rockville Centre et al.,* Index No. 900002/2019 (Sup. Ct. Nassau Cty. 2019) NYSECF Doc. No. 1 ¶ 40 ("At all times relevant hereto, Defendant, DIOCESE had a duty to protect the safety of the Plaintiff and other children under its supervision and control."). There is no specification here or in the other enumerated complaints of the basis for the referenced duty.

create an unduly large and unmanageable risk. *See id*. Indeed, "settled principles of law preclude imposing tort liability upon" an employer for an "unforeseeable crime" committed by its employee. *See N. X.*, 280 A.D.2d at 35. For all of these reasons, the identified negligence claims should be dismissed.

Finally, in addition to alleging that the Diocese was negligent in its hiring, retention, supervision, or training of its employees, some Plaintiffs allege that the Diocese is also liable for the general tort of negligence.[533] These complaints do not articulate what further duty is owed by the Diocese outside its duty to use reasonable care in hiring, retaining, supervising, and training employees based upon the information that it was aware of or reasonably should have been aware of about these employees, and with regard to conduct occurring on property owned by the Diocese or using its chattels. *See* Part VI(A). These claims of generalized negligence in cases where the plaintiff is also alleging negligent hiring, retention, supervision or training should be dismissed for failing to identify any separate duty of care sufficient to support a general negligence claim.

C. Plaintiffs Cannot Assert Claims For Negligent Failure To Provide A Safe And Secure Environment, Negligent Failure To Warn, Or Negligent Direction

Some plaintiffs seek to hold the Diocese liable under three putatively alternative theories of negligence: (i) negligent failure to provide a safe and secure environment; (ii) negligent failure to warn; and (iii) negligent direction. None of these claims are typically recognized in the context of alleged sexual abuse. Plaintiffs should not be permitted to multiply their tort claims and to recast allegations of serious and intentional harm into improper causes of action for

[533] *See, e.g., Ark6 Doe v. Diocese of Rockville Centre et al.,* Index No. 900011/2019 (Sup. Ct. Nassau Cty. 2019) NYSECF Doc. No. 1 ¶¶ 28-58.

negligence. "New York courts have rejected uniformly. . .attempts to transmogrify intentional torts into 'negligence'" *Schmidt v. Bishop*, 779 F. Supp. 321, 324 (S.D.N.Y. 1991). These alternative causes of action against the Diocese should be dismissed.

First, negligent failure to provide a safe and secure environment has only been sparingly recognized as a cause of action by a handful of courts applying New York law. *See Campbell v. Brentwood Union Free Sch. Dist.*, 904 F. Supp. 2d 275, 278 (E.D.N.Y. 2012) (granting defendants' motion to dismiss claims of high school student, who was injured by another student, alleging that school district, school, and school officials failed to provide a "safe and secure environment for Plaintiff"). The Diocese is not aware of any court that has held a religious institution negligent for failing to provide a safe and secure environment under New York law, and only one court even addressing such a cause of action and dismissing it. *See Pinks*, 2009 WL 4931802, at *4–6 (granting boys choir's motion to dismiss claim of negligent failure to provide a safe and secure environment). This claim appears to pertain to the obligation to exercise reasonable care where an individual or entity is required by law to oversee certain persons in their charge (e.g. the duty owed by a warden to inmates in a prison) or where individuals are otherwise deprived of their normal capacity to protect themselves (e.g. the duty owed by a teacher with regard to students in her classroom). *See* RESTATEMENT (SECOND) OF TORTS § 320 (1965) (observing that "a child while in school is deprived of the protection of his parents or guardian" and therefore a teacher is "properly required to give him the protection which the custody or the manner in which it is taken has deprived him"). This cause of action is not cognizable against the Diocese. Parishioners voluntarily participate in church activities and the Diocese has no role in removing any protection of their safety that would otherwise exist. Moreover, a party cannot be held liable for negligent failure to provide a safe and secure

environment where, as here, it is not alleged to have "either actual or constructive notice" of any potential harm. *Pinks*, 2009 WL 4931802, at *4–6.

Second, a claim for negligent failure to warn is not cognizable against the Diocese. The overwhelming majority of the case law addressing negligent failure to warn is in the product liability context regarding a *manufacturer's* duty to warn consumers of potential harm from the use of a product. *See, e.g.*, *Rodriguez v. Davis Equip. Corp.*, 235 A.D.2d 222 (1st Dep't 1997). This doctrine has also occasionally been recognized in the context of a landowner's failure to notify others of a danger inherent to his land. *See Jenkins v. 313-321 W. 37th St. Corp.*, 284 N.Y. 397, 401–02 (1940) (observing that a party with knowledge of a dangerous condition owes a duty to inform others of the peril); *Coffey v. Flower City Carting & Excavating Co.,* 2 A.D.2d 191, 192 (4th Dep't 1956), *aff'd*, 2 N.Y.2d 898 (1957) (observing that a party without knowledge of a dangerous condition is "subject to no duty to warn"). In rare situations this doctrine has been recognized in the context of a duty to warn regarding the risk of harm posed by an individual. *Naughright v. Weiss,* 826 F. Supp. 2d 676, 690 (S.D.N.Y. 2011) (dismissing negligent failure to warn claim regarding tortious conduct by unlicensed healthcare provider). But the Diocese is not aware of any prior case applying New York law where the doctrine of negligent failure to warn has been applied to impose a duty on an employer to warn regarding the propensity of an employee to engage in sexual abuse.

These cases should not be used to expand the doctrine of failure to warn into this uncharted area. But, even if the doctrine of negligent failure to warn were to be improperly broadened in this manner, the claims against the Diocese would nonetheless fail because the Diocese did not have a duty to warn. A duty to warn arises where one party "(1) has superior knowledge, (2) that is not available to the other party by reasonable inquiry, and (3) the first

party knows that the second party is acting on the basis of mistaken knowledge." *Naughright,* 826 F. Supp. 2d at 690. This duty may arise from a special relationship whereby a party with specific knowledge has a duty to impart the information that it has to others. *See Broydo v. Baxter D. Whitney & Sons, Inc*., No. 36387/04, 2009 WL 1815092, at *3-4 (Sup. Ct. Kings Cty. 2009). A duty to warn may also occur where a fiduciary relationship exists between the parties, which is not the case here. *See* Part V. Finally, for a duty to warn to arise a party must have knowledge of a likely impending harm. *See Coffey,* 2 A.D.2d at 192. Plaintiffs have not adequately alleged that the Diocese had such knowledge. *See* Part VI(A). The Diocese respectfully asserts that the doctrine of negligent failure to warn should not be applied in this context, and to the extent that such a claim could be asserted it fails on the merits based on the allegations in the complaints.

Finally, the Diocese is not aware of any court applying New York law recognizing the tort of negligent direction in the context of alleged child sexual abuse. Negligent direction subjects an employer to liability for physical harm caused by an act or omission by an *independent contractor* pursuant to orders or directions negligently given by an employer. RESTATEMENT (SECOND) OF TORTS § 410 (1965); *see also Meyer v. Ahmad,* No. 08-cv-5147, 2010 WL 11627484, at *5 (E.D.N.Y. Aug. 20, 2010) (negligent direction and instruction is an "alternative theory of negligence liability"). That is of course not applicable here. The Diocese is a religious institution; it has not been responsible for issuing any orders which have led to the abuse of minors. Indeed, Plaintiffs have not alleged *any* facts supporting such a negligent direction claim. Any such allegation would be diametrically opposed to the work the Diocese has undertaken to prevent child sexual abuse, and to provide compensation, psychiatric care, and medical treatment to victims of abuse. *See supra* n.1.

D. Claims For Breach Of Duty *In Loco Parentis*, Which Is Not An Independent Cause Of Action, And For Negligent Infliction Of Emotional Distress Are Impermissibly Duplicative Of Other Negligence Claims

1. Breach of duty *in loco parentis* is not an independent cause of action and even if it were, it is impermissibly duplicative

Breach of duty *in loco parentis* is not a cause of action for damages; it is merely an element of a negligence claim. Thus, courts have consistently held that other elements of negligence claims must also be satisfied for a plaintiff to prevail. *See, e.g., Ferguson v. City of New York*, 988 N.Y.S.2d 207, 208 (2d Dep't 2014) ("Under the doctrine that a school district acts *in loco parentis* with respect to its minor students, a school district owes a special duty to the students themselves, and *may be held liable to a student when it breaches that duty, so long as all other necessary elements of a negligence cause of action are established*.") (emphasis added); *Rydzynski v. N. Shore U. Hosp.*, 692 N.Y.S.2d 694, 695 (2d Dep't 1999) (affirming denial of summary judgment on negligence claim because, even though "the defendants stood *in loco parentis* to the plaintiff," there existed questions of fact regarding whether the assailant's acts were foreseeable, and whether any breach by the defendants was a proximate cause of the plaintiff's injuries). Any separately asserted counts for breach of an alleged duty *in loco parentis* thus do not state a claim and should be dismissed.

Moreover, because complaints that assert a breach of duty *in loco parentis* also assert a cause of action for negligent supervision, any claims for the breach of duty *in loco parentis* ought to be dismissed as duplicative. *See, e.g.*, *Bauver v. Commack Union Free School Dist.*, No. 10-13877, 2014 WL 1867328, at *1 (Sup. Ct. Suffolk Cty. May 1, 2014) ("[T]he [] cause of action against the School District for breach of the duty to care for students 'as a parent of ordinary prudence would act in comparable circumstances' is duplicative of the cause of action for negligent supervision.") (citations omitted); *Junger v. John v. Dinan Associates, Inc.*, 164

A.D.3d 1428, 1429 (2d Dep't 2018) (affirming dismissal of cause of action for breach of duty because it was "duplicative" of cause of action for professional negligence).

2. Negligent infliction of emotional distress is impermissibly duplicative

A claim for negligent infliction of emotional distress is allowed only in "extremely limited" circumstances to recover for emotional injury.[534] Dispositively here, this claim cannot be used to duplicate other tort claims, including other negligence claims. *See, e.g.*, *Afifi v. City of New York*, 104 A.D.3d 712, 713 (2d Dep't 2013) (collecting cases so holding); *see also Wolkstein v. Morgenstern*, 275 A.D.2d 635, 635-37 (1st Dep't 2000) (dismissing a cause of action for negligent infliction of emotional distress, despite the actions' "drastic and alarming effects," and emphasizing that "[g]enerally, a cause of action for infliction of emotional distress is not allowed if [it is] essentially duplicative of tort or contract causes of action"); *Mulligan v. Long Island Fury Volleyball Club*, 76 N.Y.S.3d 784, 790 (Sup. Ct. New York Cty. 2018) (dismissing negligent infliction of emotional distress claim as duplicative of breach of fiduciary duty claim). Every complaint that alleges negligent infliction of emotional distress also alleges at least one other cause of action for negligence. As such, these negligence claims overlap with the negligent infliction of emotional distress claim and provide a traditional basis for recovery. Any negligent infliction of emotional distress claim should be dismissed in light of this duplication.

[534] *See, e.g., Peter T. v. Children's Vill., Inc*., 30 A.D.3d 582, 585 (2d Dep't 2006) (dismissing negligent infliction of emotional distress claim arising from alleged childhood sexual abuse, emphasizing that recovery is allowed in "extremely limited" circumstances) (citation and internal quotations omitted); *Kenneth S. v. Berkshire Farm Ctr. & Servs. for Youth*, 36 A.D.3d 1092, 1094 (3d Dep't 2007) ("recovery for purely emotional damages [under a theory of negligent infliction of emotional distress] is extremely limited").

E. Negligence Claims And Claims For Breach Of Fiduciary Duty Or *Respondeat Superior* Are Impermissibly Duplicative

1. Negligence and breach of fiduciary duty

"Causes of action [such as negligence and breach of fiduciary duty] that are based on the same set of facts and theories and seek identical damages are duplicative of one another and must be dismissed." *NYAHSA Servs. Inc. v. People Care Inc*., 167 A.D.3d 1305, 1309 (3d Dep't 2018). In such circumstances, courts dismiss the negligence claim as duplicative of the breach of fiduciary duty claim. *Id*.; *see also In re Mundo Latino Mkt. Inc.*, 590 B.R. 610, 619 (Bankr. S.D.N.Y. 2018) (dismissing a claim for negligence because it is "duplicative of [a claim] for breach of fiduciary duty"; "[i]t relies on the same facts, the same elements (duty of care, breach and damages) and seeks the same relief") (citing *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc*., 10 A.D.3d 267, 271 (1st Dep't 2004) ("As to the claim for breach of fiduciary duty, we have consistently held that such a claim, premised on the same facts and seeking the identical relief sought in the legal malpractice cause of action, is redundant and should be dismissed.")). Plaintiffs' allegations regarding breach of fiduciary and negligence duty rely upon the same facts, the same legal theories, and seek the same damages. As such, negligence claims are impermissibly duplicative of the breach of fiduciary duty claims, and both cannot go forward.

2. Negligence and *respondeat superior*

Courts have consistently held, including in cases involving allegations of sexual abuse by a church's employees, that plaintiffs cannot prevail on both negligence and *respondeat superior* claims against the employer-church. That is because either the employee's alleged actions were within the scope of employment or they were not.

If the alleged actions were within the scope of employment, only *respondeat superior* liability is available. *See, e.g., Timothy Mc. v. Beacon City Sch. Dist*., 127 A.D.3d 826, 829 (2d Dep't 2015) ("Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of *respondeat superior* and no claim may proceed against the employer for negligent hiring, retention, supervision or training.") (citing cases); *Krystal G. v. Roman Catholic Diocese of Brooklyn*, 34 Misc. 3d 531, 540 (Sup. Ct. Kings Cty. 2011) (noting that the Second Department held in *Segal v. St. John's Univ.,* 69 A.D.3d 702, 703 (2010), that "[g]enerally, when a plaintiff seeks to recover damages against an employer based on an employee's actions committed within the scope of his or her employment, the employer is liable under the doctrine of *respondeat superior*, not negligent hiring or supervision").

Conversely, "where [as here] an employer cannot be held vicariously liable for its employee's torts [because they occur outside the scope of his employment]," only theories of negligent hiring, negligent retention, and negligent supervision are available. *Bouchard v. New York Archdiocese*, 719 F. Supp. 2d 255, 260 (S.D.N.Y. 2010) (quoting *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 161 (1997)) (brackets in *Bouchard*)). "This policy underlying this rule seeks to remove the potential for an employer to be doubly liable for an employee's single tortious act." *Krystal G.*, 34 Misc. 3d at 540.

Thus, to the extent plaintiffs seek damages for negligence *and* to impose liability under the *respondeat superior* doctrine, they cannot proceed under both theories of recovery; counts under one of the doctrines must be dismissed at this stage. This is a separate reason why claims pleaded under the doctrine of *respondeat superior* must be dismissed.

VII. CLAIMS THAT ARE NOT PLEADED IN ACCORDANCE WITH THE CPLR SHOULD BE DISMISSED

A. Complaints Failing to Make CPLR 208(b) or CPLR 214-g Allegations Ought To Be Dismissed

CPLR 214-g explicitly requires that a plaintiff's complaint include allegations that: (1) the alleged conduct constitutes "a sexual offense as defined in article one hundred thirty of the penal law. . .incest as defined in section 255.27, 255.26 or 255.25 of the penal law. . . or the use a child in a sexual performance as defined by section 263.05 of the penal law, or a predecessor statute that prohibited such conduct at the time of the act," (2) the alleged conduct must be against a child under the age of 18, and (3) the claim must have been time-barred by August 14, 2019. These same requirements are imposed by CPLR 208(b). *See* CPLR 208(b). The identified complaints do not provide any details as to whether the alleged conduct—vaguely described as "unpermitted sexual contact with plaintiff"—falls within the specified penal laws.[535] Such a generic description is insufficient to meet the requirements of CPLR 208(b) or CPLR 214-g.

B. Complaints Constituting Deficient Pleadings Ought To Be Dismissed

CPLR 3013 requires a complaint to be sufficiently detailed so as to "give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Two complaints are so inadequate that they do not satisfy this requirement. The complaint of Sean Donoghue is nearly 100 pages long and yet it does not identify a cause of action, merely including a section

[535] *See, e.g., ARK3 Doe v. Diocese of Rockville Centre a/k/a/ The Roman Catholic Diocese of Rockville Centre, New York et al*., Index No. 900010/2019 (Sup. Ct. Nassau Cty. 2019) NYSECF Doc. No. 1 ¶ 19.

"CAUSE OF ACTION AS AGAINST DEFENDANTS."[536] Likewise, the complaint of Thea Morales, while asserting two causes of action, is unintelligible as to what they actually are.[537] For example, the first cause of action mentions negligence as well as gross negligence and recklessness, all of which are distinct causes of action.[538] The second cause of action runs a gamut from intentional acts to *respondeat superior* to negligence.[539] These complaints fail to provide adequate notice to the Diocese as to the material elements of any cause of action, thereby prejudicing the Diocese in its ability to defend itself. Given that the predicate events in both Donoghue and Morales occurred 25 years or more ago, it is particularly unfair, *see* Part I, that plaintiffs fail to provide adequate notice of what they are actually alleging. These complaints should be dismissed, and if the Court affords leave to re-plead the plaintiffs should be instructed to identify the asserted causes of action with clarity.

VIII. CERTAIN CLAIMS FOR PUNITIVE DAMAGES AGAINST THE DIOCESE OUGHT TO BE DISMISSED BECAUSE THERE ARE NO ALLEGATIONS THAT IT ACTED WITH MALICE OR AUTHORIZED OR RATIFIED ITS EMPLOYEES' ALLEGED MISCONDUCT

Several complaints seek punitive damages against the Diocese, but as the New York case law makes clear, these requests should be dismissed at this stage because they do not assert sufficient facts in support of this rarely applicable and extraordinary remedy.

Punitive damages are generally unavailable in circumstances similar to those here. In New York, punitive damages, including in cases against religious entities for abuse of minors by

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[536] *See Sean K. Donoghue v. Diocese of Rockville Centre et al*., Index No. 900031/2019 (Sup. Ct. Nassau Cty. 2019) NYSECF Doc. No. 1 at p. 84-88.

[537] *See Thea Morales v. Diocese of Rockville Centre et al*., Index No. 616007/2019 (Sup. Ct. Suffolk Cty. 2019) NYSECF Doc. No. 2.

[538] *Id*. at ¶¶ 9-45.

[539] *Id*. at ¶¶ 46-80.

its employees, are warranted only in "singularly rare cases." *Karen S. v. Streitferdt*, 568 N.Y.S.2d 946, 947 (1st Dep't 1991) (dismissing punitive damages claims); *see also Marinaccio v. Town of Clarence*, 20 N.Y.3d 506, 511 (2013) (observing that the standard for punitive damages is "a strict one" and they are "awarded only in exceptional cases"). That is because of the high threshold for imposing such damages against employers.

As Judge Kaye explained for the New York Court of Appeals, "[i]n this State, the question has long been settled: an employer is *not* punished for malicious acts in which it was not implicated." *Loughry v. Lincoln First Bank, N.A.*, 67 N.Y.2d 369, 378 (1986) (emphasis added). That means, in the context of punitive damages, that "there is a threshold issue" severely limiting their imposition on an employer. *Id*. They can only be imposed "for the intentional wrongdoing" of an employee "where management has authorized, participated in, consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit servant, or the wrong was in pursuance of a recognized business system of the entity." *Id*. (citations omitted). In *Loughry*, for instance, punitive damages were not recoverable for slander because "[n]o serious contention [wa]s made . . . that [the bank] authorized or ratified [its employees'] statements, or deliberately retained unfit employees, or promulgated such statements as part of its regular business policy." *Id*. (also holding that conduct by a bank vice-president's cannot be equated with "participation by [the bank] and provide a basis for imposing punitive damages on the bank").

New York courts have of course followed these limitations imposed by the Court of Appeals, further observing that for punitive damages to be appropriate the wrong complained of must rise "to a level of 'such wanton dishonesty as to imply a criminal indifference to civil obligations.'" *Jeffrey B.B. v. Cardinal McCloskey Sch. & Home for Children*, 689 N.Y.S.2d 721,

724 (3d Dep't 1999) (quoting *Rocanova v. Equitable Life Assur. Socy. of U.S.*, 83 N.Y.2d 603, 614 (1994)). Indeed, courts have routinely dismissed punitive damages claims seeking to hold an entity liable for sexual abuse by an employee, including where the alleged abuse was against a minor. In *Karen S. v. Streitferdt*, for example, minor plaintiffs brought suit against a religious corporation and several related churches based on allegations that an individual, who had "nearly absolute authority" over the religious entities, "raped, sodomized and sexually abused them while they were under his religious guidance." 568 N.Y.S.2d 946, 947 (1st Dep't 1991). The court held that the plaintiffs' demand for punitive damages asserted against the religious entities should be stricken because there was "no allegation that the [religious entities] acted with malicious intent toward the plaintiffs in supervising the activity" of the alleged perpetrator. *Id.*

Similarly, in *Judith M. v. Sisters of Charity Hosp*., 93 N.Y.2d 932, 934 (2d Dep't 1999), the Court of Appeals affirmed the dismissal of plaintiff's claim for punitive damages against a hospital despite her allegation that a hospital employee sexually abused her while she was an in-patient there. Punitive damages were inappropriate because the plaintiff "presented no evidence that the Hospital's management authorized, participated in, consented to or ratified the employee's alleged tortious [sexual abuse] conduct." *Id*. (citing *Loughry*, 67 N.Y.2d at 378).

Likewise, in *Freeman v. Adams Mark Hotel*, No. 01-cv-768, 2004 WL 1811393, at *2 (W.D.N.Y. Aug. 13, 2004), the court denied a request for punitive damages against a hotel based on a sexual assault by a hotel employee. The plaintiff argued that "punitive damages [we]re warranted because the defendants deliberately retained an unfit employee [who had a criminal history and was accused by another hotel guest of sexual assault]." *Id*. The *Freeman* court rejected this argument, concluding that punitive damages would only be permissible if the hotel "*knew for a fact* that [the employee] was sexually assaulting guests, but retained him despite

such knowledge." *Id*. (citing *Loughry* and *Judith M*.) (emphasis in original); *see also Pfeiffer v. Gen. Elec. Co.*, 775 N.Y.S.2d 909, 910 (2d Dep't 2004) (holding that "[t]he trial court correctly removed from the jury the issue of punitive damages against GE" in sexual harassment case where "GE did not authorize, participate in, consent to, or ratify its employees' conduct, such as would warrant an award of punitive damages against it").

In related circumstances, in *Jeffrey BB v. Cardinal McCloskey Sch. & Home for Children*, adoptive parents sued a child care agency, which had placed six children with them, for fraud and punitive damages. The basis for the suit was the failure of the agency's employee to disclose that one of the adoptive children—who subsequently sexually abused two of their other children—had been a victim of sexual abuse. 689 N.Y.S.2d 721, 723 (3d Dep't 1999). The agency had received a report about the child's sexual abuse, but did not divulge this information to the prospective adoptive parents, despite one of the parent's specific questioning as to "whether there was anything else [about the child] that she should know." *Id.* Even then, the parents' demand for punitive damages was properly dismissed because "there [was] no reasonable basis for a finding that [the agency's] failure to disclose [the child's] past sexual abuse rose to" a level of "such wanton dishonesty as to imply a criminal indifference to civil obligations." *Id.* at 724.

Here, as in the cases discussed above, the identified complaints do not allege that the Diocese acted with malicious intent or wanton dishonesty towards its parishioners, nor do plaintiffs claim that the Diocese has displayed a criminal indifference to its civil obligations.[540]

[540] *See, e.g., JJSB Doe v. Diocese of Rockville Centre et al.,* Index No. 900046/2019 (Sup. Ct. Nassau Cty. 2019) NYSECF Doc. No. 1 ¶¶ 1, 47, 56, 63. This and other enumerated complaints seek punitive damages without alleging that the Diocese acted willfully with malicious intent or in criminal disregard of its civil obligations or otherwise ratified or authorized its employees' alleged conduct.

Absent allegations of intentional and malicious misconduct by the Diocese amounting to either participation in the alleged sexual abuse or some form of authorization of it, *see Loughry*, 67 N.Y.2d at 378, any claim for punitive damages against the Diocese must be dismissed at the pleading stage, as courts have done in similar circumstances in accordance with the Court of Appeals' precedent.

CONCLUSION

The Diocese of Rockville Centre therefore respectfully requests that the Court dismiss each of the complaints identified in the accompanying Affirmation of Todd R. Geremia with prejudice pursuant to CPLR 3211.

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Respectfully submitted,

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